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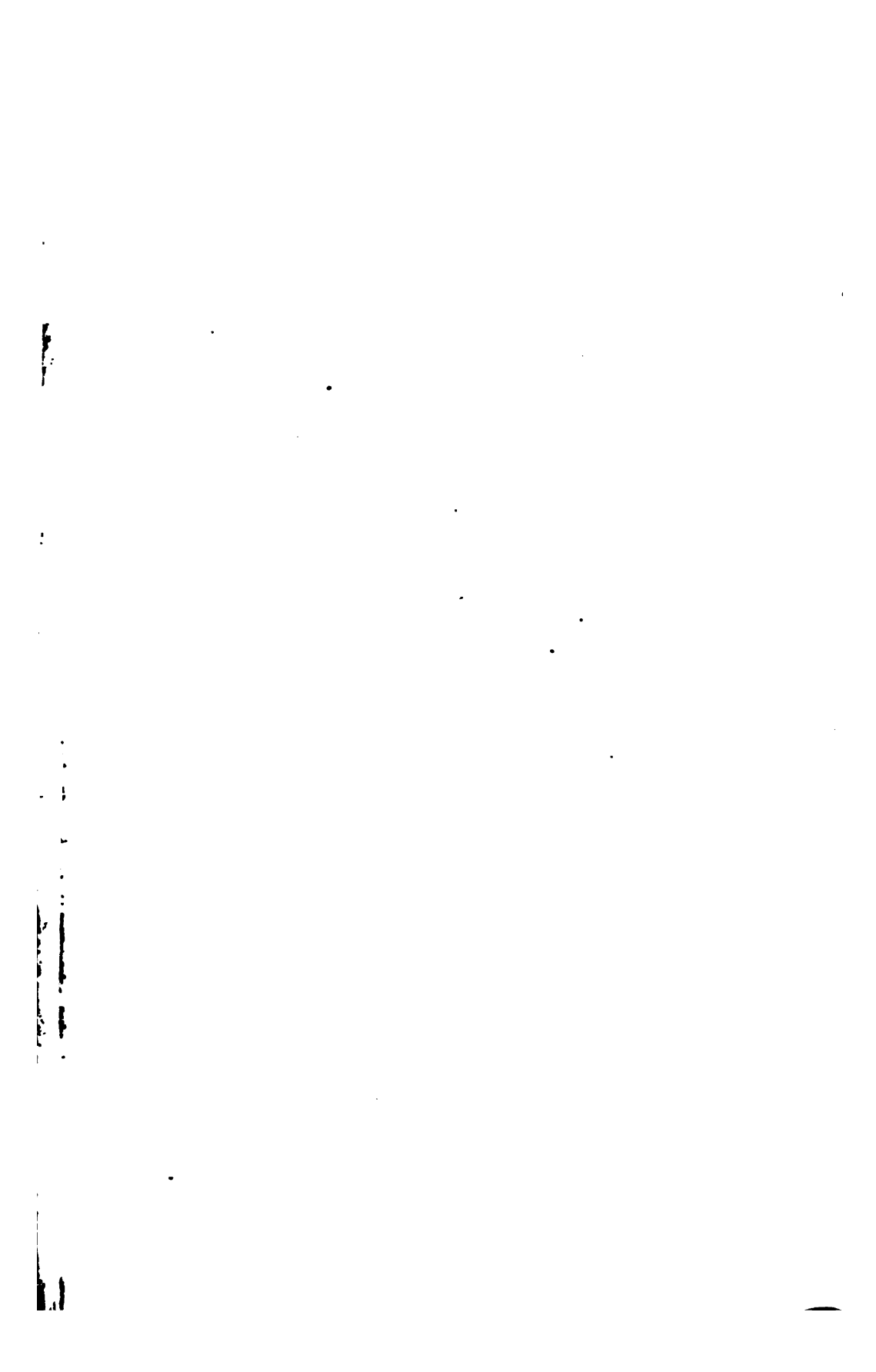
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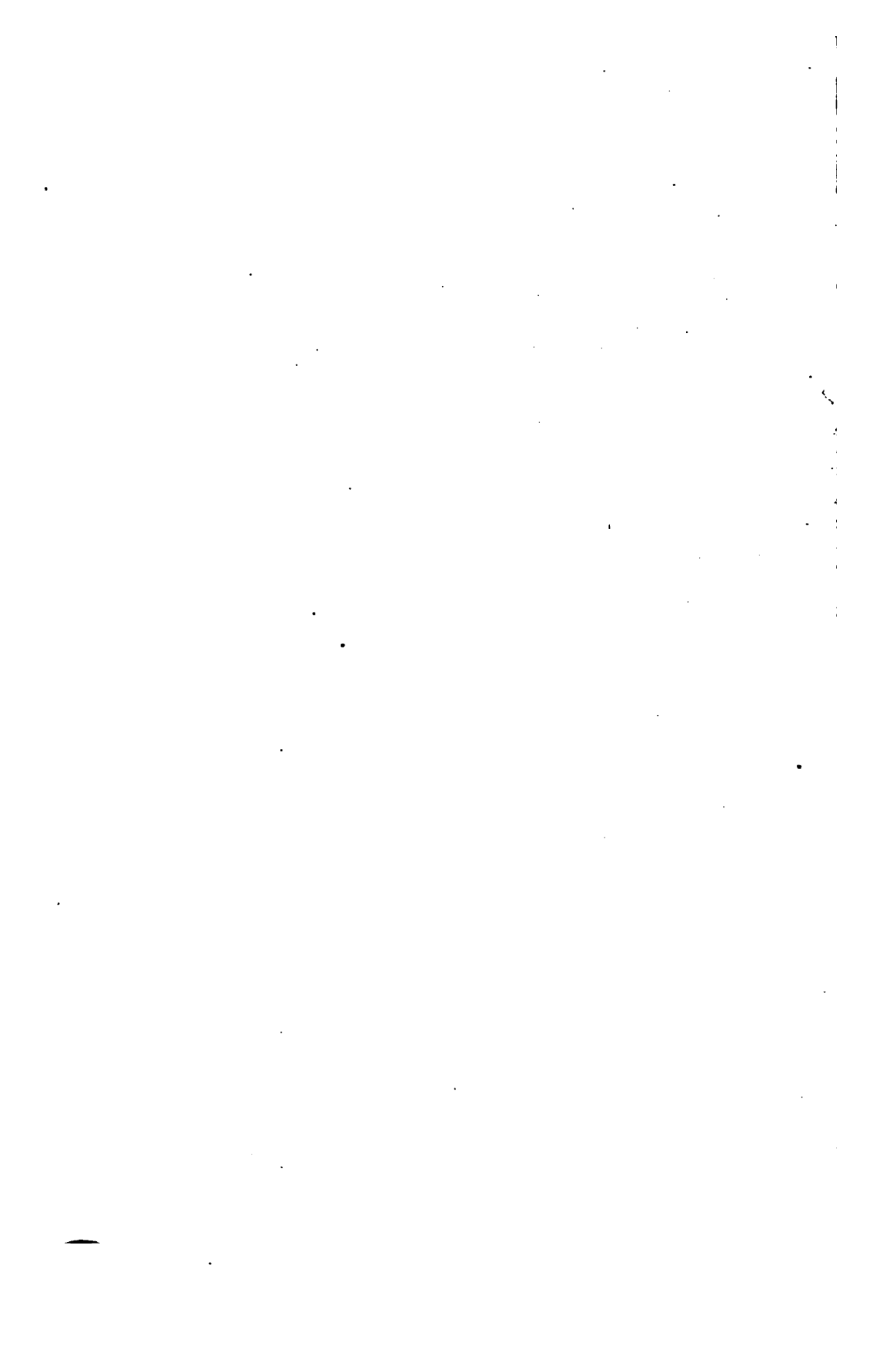
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27

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44

CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
H. HUFFMAN BROWNE,
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE
CONSTRUED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS,
ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: NEW
YORK REPORTS, VOLS. 134-141 INC.; HUN'S REPORTS,
VOLS. 67-75 INC.; DELEHANTY'S MISC. REPORTS,
VOLS. 1-6 INC.; AND NEW YORK CIVIL
PROCEDURE REPORTS, VOL. 23.

VOLUME XXIII.

NEW YORK:
S. S. PELOUBET,
LAW BOOKSELLER AND PUBLISHER,
1894.

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Rec. July 30, 1894.

CONTENTS.

Sections of the Code of Civil Procedure.		Page
4	KRAUSS <i>v.</i> HALLBEIMER.....	817
	Practice as it existed prior to the Code of Civil Procedure, when controls.	
8	PEOPLE <i>ex rel.</i> LOWER <i>v.</i> DONOVAN.....	1
	Contempt; violation of order made by court without jurisdiction is not.	
8, 9, 14	BOONE <i>v.</i> MCGUCKEN.....	115
	Contempt; costs in proceedings to punish crim- inal; appeal; disobedience of injunction when civil and when criminal contempt; advice of counsel how far excuse.	
14	MARTIN CANTINE Co. <i>v.</i> WARSHAUER.....	379
	Contempt; interposing false answer is—punish- ment.	
14	CUNNINGHAM <i>v.</i> HATCH.....	82
	Contempt; when failure to obey order direct- ing return of deposit improperly withdrawn is a.	
14	PITTSFIELD NATIONAL BANK <i>v.</i> TAILER.....	48
	Contempt; when failure to obey judgment is not.	
66	MULLER <i>v.</i> MAYOR.....	261
	Attorney's lien; may be assigned; effect of agreement for share of attorney's compensa- tion.	
66	AVERY <i>v.</i> AVERY.....	204
	Attorney's liens; who may maintain proceed- ing to enforce.	
263 subd. 7	FLYNN <i>v.</i> CENTRAL RAILWAY CO. OF NEW JERSEY.	106
	Jurisdiction of superior court of the city of New York of action against foreign corpora- tion.	

Sections of the Code of Civil Procedure.		Page
340	PECK v. DICKEY.....	210
	County Courts; jurisdiction, when and how to appear.	
362 subd. 7	ANDERSON v. PORTER.....	207
	Limitation to action on Justice's judgment; when does not prevent its enforcement by execution.	
382, 383	JORGENSEN v. MINISTER, ELDERS, AND DEACONS OF THE REFORMED LOW CHURCH OF HARLEM, ETC.	233
	Limitations to action for personal injuries; nuisance.	
385, 386	COMPTON v. BOWNE.....	235
	Limitation to action; payment when does not extend time of; mutual accounts.	
416	BAILEY v. SARGENT GRANITE CO.....	319
	Summons; copy served controls; court named in, is court in which action is pending.	
424	FOX v. BROOKS.....	345
	Appearance; right of defendant not served with summons to appear.	
425, 426	MARTIN v. RAFFIN.....	59
	Summons; service of, by leaving on defend- ant's shoulder when sufficient.	
438, 439	HATFIELD v. MALCOM.....	197
	Service by publication; affidavit to procure order for, when sufficient.	
458, 459, 462	SHAPIRO, an Infant, by ADOLPH SHAPIRO, Guard- ian <i>ad litem</i> v. BURNS.....	365
	Right of poor person to sue in "forma Pau- peris"—infant—effect of wealth of Guardian <i>ad litem</i> .	
481	ARROW STEAMSHIP CO. v. BENNETT.....	234
	Bill of particulars; not part of complaint.	
484	ADAMS v. STEVENS.....	356
	Pleading; joinder of cases of action; demurer.	
497	LEWIS v. EMPIRE STATE INS. CO.....	295
	Costs upon entry of interlocutory judgment with leave to plead over.	
500	SCHWARTZ v. WECHLER.....	21
	Answer; pleading non-joinder.	
500, 501	DINAN v. CONEYS.....	157
	Counterclaim; in action of ejectment, cause of action for devise charged thereon may be inter- posed; judgment.	
508	PETRAKION v. ARBELLY.....	183
	Pleading; complaint when sufficient in action	

CONTENTS.

v

Sections of the Code of Civil Procedure.	Page
for accounting with respect to partnership prop- erty; answer; non-performance of condition precedent; counterclaim for money loaned.	
514, 519, 523 FARRELL v. AMBERG.....	434
Pleading; construction of; reply when neces- sary; revocation of power of attorney.	
534 MUSSINAM v. HATTAN.....	400
Complaint; right to amend of course.	
531 ARROW STEAMSHIP Co. v. BENNETT.....	284
Bill of particulars; relation of, to pleaders.	
531 DUBAL WATCH-CASE MANUFACTURING Co. v. KEY- STONE WATCH-CASE Co.....	44
Bill of particulars; affidavit by attorney in sup- port of motion for, not sufficient.	
538 ZIVI v. NELKE.....	56
Denials in answer; when not stricken out as sham.	
538 BRASSINGTON v. BURNS.....	146
Pleading; motion for judgment on sham.	
539, 540 HEOLA POWDER COMPANY v. HUDSON RIVER ORE & IRON COMPANY.....	341
Pleading; variance between, and proof; amend- ment on appeal.	
539, 540 BIERSEHENK v. STOKES.....	373
Variance between pleading and proof.	
539, 540 BRADY v. NALLY.....	334
Variance between pleading and proof.	
539, 540 MERRICK, as Executrix of the Last Will and Testa- ment of MELZER F. MERRICK, deceased, v. HILL.	418
Variance between pleading and proof; objec- tion when necessary.	
542 BRASSINGTON v. ROHRS.....	146
Right to move for judgment on sham pleading, or demur to answer not lost by noticing trial.	
544 BLANC v. BLANC.....	101
Supplemental answer; adultery committed sub- sequent to action for divorce may be set up by, either as defense or counterclaim.	
544 MYERS v. ROSENBACK.....	363
District court in the city of New York; amend- ment of pleading; supplemental answer not allowed.	
545 PEOPLE ex rel. ALLEN v. MURRAY.....	53
Scandalous matter when stricken from affidavit by court of its own motion.	
559 SQUIRE v. McDONALD.....	150

Sections of the Code of Civil Procedure.		Page
	Undertaking to procure order of arrest ; liability of sureties.	
559	LAFRETEZ v. MASS.....	288
	Security for costs ; when required although undertaken to secure order of arrest.	
686	SEISKER BROS. v. POTTER PRODUCE CO.....	848
	Foreign corporation ; when court without jurisdiction of action against.	
636, 641	GARSON v. BRUMBERG.....	806
	Attachment ; recital in, of grounds of, in disjunctive.	
649	COLBERG v. EMERSON.....	837
	Attachment, how levied.	
653	HAAS v. SWICK.....	897
	Attachment ; within what time indemnity bond should be given or property delivered to claimant.	
682	STRAUS v. VOGT.....	251
	Attachment ; when the defendant and his assignee cannot both move to vacate.	
723	UNION TRUST CO. v. SCHLIEP.....	264
	Judgment foreclosing mortgage cannot be amended after sale so as to provide for deficiency.	
723, 540	HECKLA POWDER COMPANY v. HUDSON RIVER ORE & IRON COMPANY.....	341
	Pleading ; variance between, and proof ; amendment on appeal.	
723 et seq.	RAUTH v. N. Y. ELEVATED R. R. CO.....	95
	Amendment of judgment ; when court may order.	
757	COLLINS v. JEWELL.....	153
	Revival of action ; when should be ordered ; security for costs when should not be required as condition of.	
770	PEOPLE et rel. LOWER v. DONOVAN	1
	Mandamus ; cannot be issued in first department or elsewhere by judge at chambers.	
779	BRASSINGTON v. ROHRS.....	143
	Notice of trial ; does not prevent demurrer to answer or making of motion to strike out answer as sham.	
783	CAREY v. BROWNE.....	137
	Judgment by default ; when opened ; service of copy of proposed answer.	
789	WEISS v. MORRELL.....	852

CONTENTS.

vii

Sections of the Code of Civil Procedure.	Page
Notice of trial ; effect of defect, in short cause calendar.	
808 BUNDSCHU v. SIMON.....	80
Inspection and discovery ; when ordered.	
814 BULKLEY v. MOSES.....	28
Bond discharging mechanic's lien ; when suit upon may be brought after obtaining lien.	
819 HIBCOX v. N. Y. STAATS ZEITUNG AND ANOTHER..	88
Consolidation of action ; effect upon right to costs.	
880 SCHELL v. LOWE.....	800
Interpleader ; affidavit need not express doubt as to who has just claim.	
889 HAY v. MULLER as Executrix, etc.....	821
Action to recover chattel ; effect of failure to prove value.	
870 et seq. HORTON v. BARNES.....	195
Examination of party before trial ; sufficiency of affidavit.	
870 et seq. KELLY v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.....	67
Examination of party before trial when proper ; extent of discretion.	
870 et seq. WATTS v. WILCOX.....	69
Same subject.	
870, 873 et seq. SIMMONS v. HAZARD.....	15
Same subject ; affidavit of attorney ; residence of parties how stated.	
891 KRAUSS v. HALLBEIMER.....	317
Commission ; mode of settling interrogatories.	
893, 894 LAIDLEY v. ROGERS.....	110
Commission ; when oral cross-examination allowed.	
893 et seq. FRY v. MANHATTAN R. R. Co.....	98
Commission ; allowance of interrogatories.	
970, 974 BRADLEY & CURRIER COMPANY, LIMITED, v. HERTER.	408
Trial ; motion to state issues for.	
977 WEISS v. MORRELL.....	352
Notice of trial ; effect of defect in ; short cause calendar.	
983 GALLIGAN v. HORNTHAL.....	201
Place of trial ; action against public officer for libel ; motion ; imposing condition for denial.	
984, 986 SHEPHERD v. SQUIRE.....	408
Place of trial ; what is proper ; right of parties to change of.	

Sections of the Code of Civil Procedure.	Page
992, 993 MCINTYRE v. TUCKER.....	171
Appeal; when facts reviewed; case.	
998 SMITH v. INGHAM UNIVERSITY.....	398
Appeal; effect of failure to make or file case.	
999 HEGEWISCH v. SILVER.....	41
New trial; when may be granted upon minutes.	
1002 LEONARD v. GERMANIA FIRE INS. CO	158
New trial; when not granted because of surprise.	
1009 DALTON v. VANDERVEER.....	443
Practice where upon trial of equitable action the cause of action at law is proved; right to trial by jury; distinction between law and equity.	
1010 HECLA CONSOLIDATED GOLD MINING CO. v. O'NEILL.....	143
Judgment after default in amending as permitted by interlocutory judgment sustaining demurrer.	
1010, 1021 GARLAND v. VAN RENSSELAER.....	203
Demurrer; form of decision; judgment.	
1239 SMITH v. SMITH.....	336
Divorce; entry of judgment in action tried before referee.	
1237 ARROW STEAMSHIP CO. v. BENNETT	234
Judgment-roll; what papers should be contained in, where judgment is entered on demurrer; bill of particulars.	
1241 CUNNINGHAM v. HATCH.....	82
Order directing return of deposit improperly withdrawn not enforceable by execution.	
1341 CARLING v. PERCELL.....	140
Appeal from city court of New York to court of common pleas; security to perfect.	
1241 PITTSFIELD NATIONAL BANK v. TAILER.....	48
Appeal; when security to stay proceedings pending, prevents the taking of proceedings to punish the appellant for contempt.	
1232-1292 NATIONAL BROADWAY BANK v. HITCH.....	10
Judgment; when laches will defeat motion to set aside error in law.	
1294 ZIVI v. NELKE.....	56
Appeal; does not lie from judgment by default.	
1294 KELLER v. FELDMAN.....	37
Same subject.	

CONTENTS.

ix

Sections of the Code of Civil Procedure.	Page
1294 BIERSHENK v. STOKES.....	375
Appeal; when interlocutory decision not reviewed.	
1810 DURANT LAND IMPROVEMENT CO. v. THOMPSON-HOUSTON ELECTRIC CO.....	29
Summary proceedings; may be maintained, notwithstanding stay, pending appeal from judgment.	
1827 PITTSFIELD NATIONAL BANK v. TAILER.....	48
Appeal from judgment; when prevents taking of proceedings to punish for contempt in not obeying it.	
1866 <i>et seq.</i> PIEPGRAS v. EDMUNDS.....	241
Execution; when irregular, but not void; when protects officer.	
1877 Subd 2 ANDERSON v. PORTER.....	297
Execution; when may issue on district court judgment action on which is barred by the statute of limitations.	
1898, 1404 COUNTRYMAN v. COUNTRYMAN.....	161
Exemption from execution; pension money.	
1484 STEWART v. PATON.....	286
Sale of real property; what expense of advertising of, may be taxed as a disbursement.	
1484 Baldwin v. Baldwin.....	287 Note
Same; power of court to direct extra advertising.	
1582 BALDWIN v. BALDWIN.....	268
Partition; property held in joint tenancy may be partitioned and sold although some of the joint tenants object.	
1581 FLYNN v. LYNCH.....	369
Partition; disposition of infant's share; death of owner of share after sale.	
1636 <i>et seq.</i> HATFIELD v. MALCOLM.....	197
Foreclosure of mortgage; proof; referee's oath.	
1638, 1639 KINGS v. TOWNSEND.....	326
Pleading; in an action to determine claim to real property.	
1726 HAY v. MULLER as Executrix, etc.....	321
Action to recover chattel; effect of failure to prove value; charge to jury.	
1730 HAY v. MULLER as Executrix, etc.....	321
Action to recover chattel; effect of failure to prove value; charge to jury; appeal.	
1770 BLANC v. BLANC.....	101

Sections of the Code of Civil Procedure.	Page
Divorce; adulteries subsequent to commence- ment of action as counterclaim in.	
1775 FRASER v. GRANITE STATE PROVIDENT ASSOCIA- TION.....	890
Pleading; averment of domicil of foreign cor- poration	
1776 MARTIN CANTINE CO. v. WARSHAUER.....	879
Pleading; denial of incorporation.	
1780 SEISER BROS. CO. v. POTTER PRODUCE CO.....	848
Foreign corporation; when court without juris- diction of action against.	
1780 FLYNN v. CENTRAL RAILWAY CO. OF N. J....	106
Jurisdiction of superior court of city of New York of actions against foreign corporations.	
1788 RICH v. SARGENT GRANITE CO.....	859
Receiver of corporation; power of temporary; examination of person having property.	
1810, 1813 LOGAN v. MCCALL PUBLISHING CO.....	246
Supplementary proceedings; when receiver of foreign corporation may be appointed in.	
1823 WINTEMEYER v. SHERWOOD as Executrix of HENRY A. SHERWOOD, deceased.....	422
Statute of limitations; when begins to run as to claim against decedent's estate; what rejection of claim is sufficient.	
1919, 1923 <i>et seq.</i> SCHWARTZ v. WECHLER.....	21
Unincorporated association; when members of, may be sued on claim owing by, although president or treasurer has not been.	
1901 PEOPLE <i>ex rel</i> BALDWIN v. GOLDFOGLE.....	417
Writ of prohibition; when not granted to re- strain summary proceedings.	
2067 <i>In re</i> TOMMY v. STINER.....	838
Mandamus; cannot be used as a means of try- ing title to office.	
2067 <i>et seq.</i> PEOPLE <i>ex rel.</i> ALLEN v. MURRAY.....	71
Mandamus; when granted to compel justice to sign final order and issue warrant in summary proceedings.	
2068, 2069 PEOPLE <i>ex rel.</i> LOWER v. DONOVAN.....	1
Mandamus; cannot be issued at chambers; cannot issue on election day.	
2091 PEOPLE <i>ex rel.</i> BALDWIN v. GOLDFOGLE.....	417
Writ of prohibition; when not granted to re- strain summary proceedings.	
2202, 2206 <i>In re</i> PATTEN.....	831

CONTENTS.

xi

Sections of the Code of Civil Procedure.	Page
Insolvent debtor ; discharge from imprisonment when not allowed because schedule of property insufficient.	
2281 PEOPLE <i>ex rel.</i> BALDWIN v. GOLDFOGLE.....	417
Writ of prohibition ; when not granted to restrain summary proceedings.	
2281 <i>et seq.</i> DURANT LAND IMPROVEMENT CO. v. THOMPSON-HOUSTON ELECTRIC CO.....	29
Summary proceedings ; what demand for rent sufficient basis for ; no stay pending appeal from order in.	
2244 ROGERS v. EARLE.....	290
Jurisdiction of justice in summary proceedings ; equitable defense.	
2248, 2249, 2251 PEOPLE <i>ex rel.</i> ALLEN v. MURRAY.....	71
District courts in the city of New York ; right of justice to demand evidence of attorney's authority ; summary proceedings ; when justice must sign final order and issue warrant.	
2268 DURANT LAND IMPROVEMENT CO. v. THOMPSON-HOUSTON ELECTRIC CO.....	29
Summary proceedings ; appeal from order in.	
2266 <i>et seq.</i> PITTSFIELD NATIONAL BANK v. TAILER.....	48
Contempt ; when proceedings to punish for failure to obey judgment cannot be taken until after service of certified copy.	
2266, 2281 BOONE v. MCGUCKEN.....	115
Contempt ; proceedings to punish for ; form of adjudication.	
2281, 2284 MARTIN CANTINE CO. v. WARSHAUER.....	379
Contempt ; interposing false answer is ; punishment ; pleading ; denial of incorporation.	
2281 FLYNN v. LYNCH.....	309
Partition ; disposition of infant's share ; death of owner of share after sale.	
2258 STEPHENS v. PAGE.....	191
Supplementary proceedings cannot be maintained against a corporation.	
2422 BARNES v. LEVY.....	253
Supplementary proceedings ; production of books, how compelled.	
2435 <i>et seq.</i> 2468 LOGAN v. MCCALL PUBLISHING CO.....	246
Supplementary proceedings ; when maintainable against foreign corporation ; receiver.	
2456 BACHELDOR v. NUGENT.....	178
Supplementary proceedings ; office for transaction of business in person defined.	

Sections of the Code of Civil Procedure.	Page
2463 STEPHENS v. PAGE.....	191
Supplementary proceedings; cannot be main- tained against a corporation.	
2660 KNOX v. NOBEL.....	811
Administrator; when appointment of, may be attacked collaterally; infant cannot be.	
2660 KNOX v. NOBEL....	429
Same object.	
2749 ESTATE OF WILLIAM C. BELL.....	128
Sale of testator's property to pay his debts; when may be ordered.	
2863 <i>subd.</i> 4, WALKER v. SCOTT.....	90
2944, 2945-2950 Pleadings; amendment of in action removed from district court to court of common pleas.	
2863 BARTLETT v. MUGETT....	288
Justice's court; jurisdiction where amounts claimed in pleadings exceed \$400.	
2916, 2918 KINGSFORD v. BUTLER.....	228
Justice's court; judgment by default; where attachment issued; when justice should dis- miss action.	
2934, 2944 MYERS v. ROSENBECK.....	363
District court in the city of New York; amend- ment of pleading; supplemental answer not allowed.	
2950 BARTLETT v. MUGETT.....	288
Justice's court; jurisdiction.	
2951, 2952 PEOPLE <i>ex rel.</i> BALDWIN v. GOLDFOGLE.....	417
Writ of prohibition; when not granted to re- strain summary proceedings.	
3017, 3020 ANDERSON v. PORTER.....	297
District court judgment; to what extent be- comes judgment of the court of common pleas on filing of transcript.	
3063 KINGSFORD v. BUTLER.....	228
Appeal from justice's court.	
3068 BARTLETT v. MUGETT.....	288
Justice's judgment; review of determination that court has not jurisdiction, on appeal for new trial.	
3070, 3072 VOGEL v. SCHLUETER.....	256
Costs, where new trial had on appeal from justice's court.	
3191 <i>subd.</i> 3 KELLER v. FELDMAN.....	87
Appeal; order denying motion to open judg- ment by default not reviewable on appeal from	

CONTENTS.

xiii

Sections of the Code of Civil Procedure.	Page
city court of New York to court of common pleas.	
3192 CARLING v. PUROELL.....	140
Security necessary to perfect appeal from city court of New York to court of common pleas.	
3198 BIERSHENK v. STOKES.....	875
Variance between pleading and proof; appeal; when interlocutory decision not reviewed.	
3215 WALKER v. SCOTT.....	90
Action removed from district court to court of common pleas; amendment of pleadings.	
3232, 3233 BRASSINGTON v. ROHRS.....	146
Award of costs by interlocutory judgment and their collection.	
3238 HADLEY v. PETHCAL.....	216
Costs of motion for new trial, discretionary.	
3239, 3232 TALLMAN v. BERNHARD.....	284
Costs; right to, where demurrer sustained.	
3236 HADLEY v. PETHCAL.....	216
Costs of motion; when discretionary.	
3238 et seq. MARX v. GROSS.....	97
Costs; when cannot be taxed after having once been paid as condition of granting a favor.	
3247 THORN v. BEARD.....	188
Costs; liability of assignee of plaintiff's claim.	
3251 HADLEY v. PETHCAL.....	216
Costs of motion for new trial discretionary to abide event.	
3251 COLE v. LOWRY.....	118
Costs; when two trial fees taxable.	
3251 LEWIS v. EMPIRE STATE INS. CO.....	295
Costs; what taxable upon entry of interlocu- tory judgment overruling demurrer with leave to plead over.	
3251 WARD v. WARD.....	61
Costs of motion; by whom adjusted.	
3251 CASSIDY v. MCFARLAND.....	65
Costs of appeal from order; adjustment of.	
3253 DODE v. MANHATTAN RAILWAY CO.....	180
Extra allowance; upon what granted.	
3253 T. NEW MANUFACTURING CO. v. GALWAY.....	239
Extra allowance; basis on which computed in creditor's action to set aside conveyance.	
3256 WARD v. WARD.....	61
Disbursements; what allowed.	
3256 CASSIDY v. MCFARLAND.....	65
Same subject.	

Sections of the Code of Civil Procedure.	Page
8266 GRIGGS v. GUINN.....	46
Disbursements; stenographer's fees when not taxable.	
8266 STEWART v. PATON.....	286
Costs; disbursements made for extra advertising in action for partition; when cannot be taxed.	
8262 et seq. HECLA CONSOLIDATED GOLD MINING Co. v. O'NEILL.....	148
Costs; taxation of in equitable action.	
8266, 8273 LAFRENTZ v. MASS.....	288
Security for costs when required although undertaking given to secure order for arrest.	
8396 GRIGGS v. GUINN.....	46
Referee's fees; when stipulation as to, too indefinite.	
8397 STEWART v. PATON.....	286
Costs; referee's fee in partition action.	
8389 DALTON v. VANDEVEER.....	448
Practice where upon trial of equitable action at law is proved; right to trial by jury; distinction between law and equity.	
8848 subd. 2 CUNNINGHAM v. HATCH.....	82
Mandate; what is.	
8847 MYERS v. ROSENBACK.....	262
District court in the city of New York; amendment of pleading; supplemental answer not allowed.	

TABLE OF CASES REPORTED.

A.	Page		Page
Adams v. Stevens.....	356	Brady v. Nally.....	384
Allen, People <i>ex rel.</i> v. Mur- ray.....	53	Brassington v. Rohrs.....	146
Allen, People <i>ex rel.</i> v. Mur- ray.....	71	Brooks, Fox v.....	345
Amberg, Farrell v.....	434	Broune, Carey v.....	187
Arrow Steamship Co. v. Ben- nett.....	234	Brumberg, Garson v.....	306
Anderson v. Porter.....	297	Buckley v. Moses.....	28
Arbely, Petrakion v.....	183	Bundschu v. Simon.....	80
Avery v. Avery.....	204	Burns, Shapiro v.....	365
		Butler, Kingsford v.....	223
		C.	
B.		Carey v. Broune.....	187
Bailey v. Sargent Granite Co.	319	Carling v. Percell.....	140
Baldwin v. Baldwin.....	268	Cassidy v. McFarland.....	65
Baldwin v. Baldwin.....	287 note.	Central Railway Co. of N. J., Flynn v.....	106
Baldwin, People <i>ex rel.</i> v. Goldfogle.....	417	Colberg v. Emerson.....	337
Barnes, Horton v.....	195	Cole v. Lowry.....	118
Barnes v. Levy.....	253	Collins v. Jewell.....	153
Bartlett v. Mugett.....	288	Compton v. Bowne.....	225
Batchelder v. Mugett.....	178	Coneys, Dinan v.....	157
Beard, Thorn v.....	189	Countryman v. Countryman.	161
Bell, Estate of William C....	128	Cunningham v. Hatch.....	82
Bennett, Arrow Steamship Co. v.....	234	D.	
Bernhard, Tallman v.....	284	Dalton v. Vanderveer.....	443
Biershenk v. Stokes.....	375	Dickey, Peck v.....	210
Blanc v. Blanc.....	101	Dinan v. Coneys.....	157
Boone v. McGucken.....	115	Dode v. Manhattan Railway Co.....	180
Bowne, Compton v.....	225	Donovan, People <i>ex rel.</i> Lower v.....	1
Bradley & Currier Co., lim- ited, v. Herter.....	408	Dubal Watch Case Man'fg Co. v. Keystone Watch Case Man'fg Co.....	44

xvi TABLE OF CASES REPORTED.

	Page		Page
Durant Land Improvement		Heckla Consolidated Gold	
Co. v. Thompson-Houston		Mining Co. v. O'Neill.....	148
Electric Co.....	29	Hecla Power Co. v. Hudson	
E.		River Ore & Iron Co.....	841
Earle, Rogers v.....	220	Hegewisch v. Silver.....	41
Edmunds, Piepgras v.....	241	Herter, Bradley & Currier	
Emerson, Colberg v.....	337	Co., limited, v.....	408
Empire State Ins. Co, Lewis v	295	Hill, Merrick v.....	418
F.		Hiscock v. New Yorker	
Farrell v. Amberg.....	484	Staats Zeitung.....	87
Feldman, Keller v.....	37	Hitch, National Broadway	
Flynn v. Central Railway Co.		Bank v.....	10
of N. J.....	106	Hornthal, Galligan v.....	201
Flynn v. Lynch.....	369	Horton v. Barnes.....	195
Fox v. Brooks.....	345	Hudson River Ore & Iron	
Fraser v. Granite State Provi-		Co., Hecla Powder Co. v..	341
dent Ass'n.....	390	I.	
Fry v. Manhattan Railway		Ingraham University, Smith	
Co.....	99	v.....	394
G.		J.	
Galway, T. New Man'fg Co. v.	289	Jewell, Collins v.....	153
Galligan v. Hornthal.....	201	Jorgensen v. Minister, Elders	
Garland v. Van Rensselaer..	208	and Deacons of the Re-	
Garson v. Brumberg.....	306	formed Low Church of	
Germania Life Ins. Co, Leon-		Harlem.....	282
ard v.....	155	K.	
Goldfogle, People ex rel. Bald-		Keller v. Feldman.....	37
win v.....	417	Kelly v. New York Central	
Granite State Provident As-		& Hudson River Railroad	
sociation, Frazer v.....	390	Co.....	67
Griggs v. Guise.....	46	Keystone Watch Case Co.,	
Gross, Marx v.....	97	Dubal Watch Case Man'fg	
Guise, Griggs v.....	46	Co. v.....	44
H.		Kings v. Townshend.....	326
Hass v. Swick.....	397	Kingsford v. Butler.....	228
Hadley v. Pethcal.....	216	Knox v. Nobel.....	311
Hallbeimer, Krauss v.....	317	Knox v. Nobel.....	429
Hatch, Cunningham v.....	82	Krauss v. Hallbeimer.....	317
Hatfield v. Malcolm.....	197	L.	
Halton, Mussinam v.....	400	Lafrentz v. Mass.....	288
Hay v. Muller.....	321	Laidley v. Rogers.....	110
Hazard, Simmons v.....	15	Leonard v. Germania Life	
		Ins. Co.....	155

xvii

	Page	N.		Page
Levy, Barnes v.....	258	Nally, Brady v.....		384
Lewis v. Empire State Ins. Co.....	295	National Broadway Bank v. Hitch.....		10
Logan v. McCall Pub. Co....	246	Nelke, Zivi v		57
Lowe, Schell v.....	801	New York Central & Hud- son River Railroad Co., Kelly v.....		67
Lower, People ex rel. v. Don- ovan.....	1	New York Elevated Railroad Co., Rauth v.....		95
Lowry, Cole v.....	118	New York Staats Zeitung, Hiscox v.....		87
Lynch, Flynn v.....	819	Nobel, Knox v.....		311
		Nobel, Knox v.....		429
		Nugent, Batchelder v.....		178
M.		O.		
McCall Pub. Co., Logan v...	246	O'Neill, Heckla Consolidated Gold Mining Co. v.		148
McCall Pub. Co., Stephens as receiver, etc., of, v. Page.....	191			
McDonald, Squire v.....	150			
McFarland, Cassidy v.....	65	P.		
McEntyre v. Tucker.....	171	Page, Stephens, as Receiver, etc., of the McCall Pub. Co., v.....		191
McGucken, Boone v.....	115	Paton, Stewart v.....		286
Malcolm, Hatfield v.....	197	Patton, in re William L....		331
Manhattan Railway Co., Dode v.....	180	Peck v. Dickey.....		210
Manhattan Railway Co., Fry v.	99	People, ex rel. Lower v. Don- ovan....		1
Martin Cantine Co. v. War- shauer.....	879	People, ex rel. Baldwin v. Goldfogle		417
Martin v. Raffin	59	People, ex rel. Allen v. Mur- ray.....		53
Max v. Gross.....	97	People, ex rel. Allen v. Mur- ray.....		71
Mass v. Lafrentz	238	Percell, Carling v.....		140
Mayer, Mullen v.....	261	Pethcal, Hadley v.....		216
Merrick v. Hill.....	418	Petrakion v. Arbelly.....		188
Ministers, Elders and Dea- cons of the Reformed Low Church of Harlem, Jor- gensen v.....	283	Piepgas v. Edmunds.....		241
Morrell, Weiss v.....	352	Pittsfield National Bank v. Tailer.....		48
Moses, Buckley v.....	28	Porter, Anderson v....		297
Mugett, Bartlett v.....	286	Patter, Produce Co., Seiser Bros. Co. v.....		348
Muller, Hay v.....	261			
Muller v. Mayor.....	261			
Murray, People ex rel. Al- len v	53			
Murray, People ex rel. Al- len v.....	71			
Mussnam v. Hatton,.....	400			
Myers v. Rosenback.....	363			

xviii TABLE OF CASES REPORTED.

R.		Page		Page
Rauth v. New York Elevated Railroad Co.....		95	Stiner, <i>in re</i> Torney v.....	333
Reformed Low Church of Harlem, Jorgenseu v. Minister, Elders and Deacons of.....		232	Stokes, Biershenk v.....	375
Rich v. Sargent Granite Co.		359	Strauss v. Vogt.....	251
Roffin, Martin v.....		59	Swick, Haas v.....	397
Rogers v. Earle.....		220		
Rogers, Laidley v.....		110	T.	
Bohrs, Brassington v.....		146	Tallman v. Bernhard.....	234
Rosenback, Meyers v.....		363	Thompson-Houston Electric Co., Durant Land Imp. Co. v.	29
			Thorn v. Beard.....	189
			T. New, Manuf'g Co. v.	
			Galway.....	239
			Torney v. Stiner, <i>in re</i>	333
			Townshend, Kings v.....	326
			Tucker, McEntyre v.....	171
S.			U.	
Sargent, Granite Co., Bailey v.		319	Union Trust Co. v. Schliep..	264
Sargent, Granite Co., Rich v..		359		
Schell v. Lowe.....		301		
Schliep, Union Trust Co v..		264	V.	
Schueter, Vogel v.....		256	Vanderveer, Dalton v.....	443
Schwartz v. Wechler....		21	Van Rensselaer, Garland v...	306
Scott, Walker v.....		9	Vogel v. Schueter.....	256
Seiser Bros. Co. v. Potter Produce Co.....		348	Vogt, Strauss v.....	251
Shapiro v. Burns.....		365		
Shepherd v. Squire.....		403	W.	
Sherwood, Wintermeyer v..		432	Walker v. Scott.....	9
Silver, Hegewisch v.....		41	Ward v. Ward.....	61
Simmons v. Hazard.....		15	Warshauer, Martin Cantine Co. v.....	379
Simon, Bundschu v.....		80	Watts v. Wilcox.....	69 note.
Smith v. Ingham University		393	Wechler, Schwartz v.....	21
Smith v. Smith.....		336	Weiss v. Morrell.....	352
Squire, McDonald v.....		150	Wilcox, Watts v.....	69 note.
Squire, Shepherd v.....		403	Wintermeyer v. Sherwood..	422
Stephens as Receiver, etc. of the McCall Pub. Co. v.				
Page.....		191	Z.	
Stevens, Adams v.....		356	Zivi v. Nelke...	57.
Stewart v. Paton.....		236		

TABLE OF CASES CITED

IN THE OPINIONS.

a—affirmed; ap—approved; cf—confirmed; d—distinguished; f—followed; nf—not followed; o—overruled; r—reversed.

A.

Cases.	Where Reported.	Page Cited.
Adams v. Adams	20 N. H. 299.....	105
Adams v. Ward.....	60 How. Pr. 238.....	150 d 296
Matter of Adler.....	60 Hun, 461.....	40
Ahrens v. Burke.....	63 How. Pr. 50.....	78
Aldinger v. Pugh	57 Hun, 181; s. c., 32 St. Rep. 53; aff'd 132 N. Y. 407; s. c. 44 St. Rep. 566.....	119
Anon.....	17 Abb. Pr. 48.....	104
Anon.....	36 How. Pr. 366.....	395
Anon.....	3 Sandf. 756.....	f 296
Anon.....	59 N. Y. 813.....	39
Armstrong v. Crimmins.....	20 Hun, 817.....	419
Arnold v. Angell.....	62 N. Y. 508.....	342, 378
Arnold v. Downing.....	11 Barb. 554.....	237
Audley v. Jay.....	Poph. 176.....	6
Austin v. Goodrich.....	49 N. Y. 266.....	f 380

B.

Bailey v. Stone.....	41 How. Pr. 349.....	291
Baldwin v. Roberts.....	80 Hun, 163.....	f 300
Balloton v. Seignett.....	2 Abb. Pr. 121.....	222
Bank of Cooperstown v. Tamajo.....	77 N. Y. 476.....	f 47
Bank v. Gifford.....	40 Barb. 659.....	189
Bannermann v. Quackenbush.....	2 City Ct. R. 172.....	218
Bank v. Van Rensselaer.....	6 Hill 240.....	438
Barante v. Deyermant.....	41 N. Y. 355.....	89

TABLE OF CASES CITED.

Cases.	Where Reported.	Page Cited.
Barnes v. Mayor.....	27 Hun, 236.....	f 303
Barney v. Burstenbinder.....	7 Laus. 210; s. c. 64 Barb. 212, 108	
Barrett v. Barrett.....	1 Hagg. Ecc. 22.....	105
Barton v. Herman.....	11 Abb. Pr. N. S. 378.....	177
Barton v. Spies.....	5 Hun, 60.....	358
Baumann v. Williams.....	18 Abb. Pr. 158.....	26
Baylis v. Stimson.....	110 N. Y. 621.....	438
Becker v. Church.....	115 N. Y. 562.....	f 219, 225
Belknap v. Hasbrouck.....	13 Abb. Pr. 413.....	179
Bellcairn, The L. R.....	10 Pro. Div. 161.....	14
Bennett v. Lycoming & Erie Ins. Co.....	67 N. Y. 274.....	f 400
Berger v. Dubernet.....	7 Robt. 1.....	394
Berry, Matter of.....	26 Barb. 55.....	36
Biershenk v. Stokes.....	18 N. Y. Supp. 854; 46 N. Y. St. Rep. 179.....	377
Blake v. Mich. So. R. R. Co.....	17 How. Pr. 228.....	f 89, 90
Bockes v. Lansing.....	74 N. Y. 437.....	449
Bohlen v. Met. El. R. R.....	31 St. Rep. 888.....	96
Bolton v. Schriever.....	135 N. Y. 70.....	433
Borham v. Borham.....	2 Prob. Did. 193.....	105
Bort v. Yaw.....	46 Iowa, 323.....	359
Bostley v. Wilson.....	12 N. Y. Supp. 45.....	40
Bowery Nat. Bank v. Mayor.....	4 N. Y. St. Rep. 656.....	f 303
Bowman v. Tallman.....	19 Abb. Pr. 84.....	36
Boylston v. Wheeler.....	61 N. Y. 521.....	328
Brewster v. Silence.....	8 N. Y. 207.....	358
Brewster v. Stewart.....	3 Wend. 441.....	89
Brinkley v. Brinkley.....	47 N. Y. 40.....	f 119
Brisco v. Brisco.....	2 Addams Ecc. 259.....	105
Broadwell v. Holcomb.....	65 How. Pr. 502.....	36
Brooklyn Oil Works v. Brown.....	7 Abb. N. S. 383.....	40
Brooks v. Mexican Nat. Const. Co.....	49 N. Y. Super. Ct. 234, and 50 N. Y. Super. Ct. 281.....	108 d 109
Brown v. Colie.....	1 E. D. Smith, 270.....	96
Brown v. Gump.....	59 How. Pr. R. 507.....	179
Brown v. Hardie.....	5 N. Y. 678.....	394
Brown v. Howard.....	8 N. Y. Supp. 59.....	180
Brown v. Leigh.....	49 N. Y. 78.....	403
Brown v. Teel.....	59 Hun, 91.....	f 330
Brownell v. Carnley.....	8 Duer, 9.....	339
Bullymore v. Cooper.....	46 N. Y. 236.....	331
Bump v. Delaney.....	12 N. Y. Supp. 901.....	f 230
Bunge v. Koop.....	48 N. Y. 225.....	438
Burke v. Thorne.....	44 Barb. 363.....	440
Burns v. O'Neil.....	10 Hun, 495.....	d 215

TABLE OF CASES CITED.

xxi

Cases.	Where Reported.	Page Cited.
Bush v. Rochester City Bank.....	48 N. Y. 639.....	397
Butler v. Butler.....	4 Litt. (Ky.) 202	105
Butler v. Miller.....	1 N. Y. 496.....	f 35
Button v. Chapin.....	7 Civ. Pro. 278.....	d 323

C.

Cahill v. Hilton.....	31 Hun, 114.....	156
Calmbacher v. Newman.....	18 N. Y. Supp. 198.....	f 96, 97
Cannon v. Logan.....	5 Port. (Ala.) 77.....	309
Capet v. Parker.....	3 Sandf. 662.....	224
Carl v. Lefferts.....	1 Johns. Cas. 395.....	nf 89
Carow v. Mowatt.....	2 Edw. Ch. 58.....	f 314, f 433
Carraher v. Carraher.....	42 How. Pr. 458.....	395
Chester v. Jumel.....	24 N. Y. St. R. 214.....	f 263
Chapman v. Montgomery.....	63 N. Y. 230.....	447
Christian Jensen Co. <i>in re</i>	128 N. Y. 550.....	43
Chemical Bank v. Colwell.....	132 N. Y. 250.....	d 33
Church v. Stanton.....	9 St. Rep., 121.....	359
Churchill v. Onderdonk.....	59 N. Y. 134.....	328
Clark v. Poor.....	56 St. Rep. 122.....	329
Clark v. Goodrich.....	41 N. Y. 212.....	f 338
Clark v. Rowling.....	3 N. Y. 216.....	f 35
Clark v. Swift.....	14 N. Y. Supp. 61.....	f 173
Clark v. Dillon.....	97 N. Y. 370.....	438
Clark v. Sullivan.....	10 N. Y. Supp. 397.....	217
Clifton v. Brown.....	2 Civ. Pro. 44.....	f 148
Cloos v. Cloos.....	55 Hun. 450	f 233
Clute v. Mahon.....	9 N. Y. Supp. 713.....	40
Clute v. McCrea.....	12 St. R. 647.....	188
Clyde v. Rogers.....	87 N. Y. 625.....	39
Cockerill v. Looman.....	36 Hun. 353.....	440
Colman v. Orser.....	5 Duer, 250.....	f 339
Concordia Savings Aid Ass. v. Read.....	93 N. Y. 474.....	382
Conklin v. N. Y. El. R. R.	18 Civ. Pro. R. 866.....	96
Cook v. Warren.....	88 N. Y. 37.....	438
Cooper v. Jones.....	4 Sand. 699.....	400, 402
Copley v. Hay.....	12 N. Y. Supp. 277.....	29
Cooper Co. v. Dimmock.....	29 Hun, 299.....	218
Cornwall v. Cornwall.....	30 Hun, 573.....	104
Costello v. St. L. C. Ct.....	28 Mo. 259.....	77
Crane v. McDonald.....	118 N. Y. 648.....	303
Crannell v. Comstock.....	12 Hun. 293.....	293
Crary v. Norwood.....	5 Abb. Pr. 219.....	f 296
Cunningham v. Hatch.....	18 N. Y. Suppl. 458.....	84
Cutlery Co. v. Rowe.....	5 Abb. N. C. 142.....	218

D.

Cases.	Where Reported.	Page Cited.
Darrah v. Boys.....	16 Daly, 309.....	27
Dauidge v. Mayo.....	5 N. Y. Supp. 475.....	187
Davis v. Borst.....	58 N. Y. 669.....	40
Davis Sewing Machine Co. v. Best.....	50 Hun, 79.....	f 173, 174
Day v. Bach.....	87 N. Y. 56.....	245
Day v. Town of New Lots.....	107 N. Y. 148.....	385
De Cumont v. Morgan.....	21 Weekly Dig. 357.....	359
Deeves v. Metropolitan Co.....	6 Misc. 91.....	403, 410
De Forest v. Bates.....	1 Edw. Ch. 394.....	443
Dejonge v. Brennenman.....	23 Hun, 238.....	121
Delany v. Vanderveer.....	7 N. Y. Supp. 262.....	385
Denton v. Noyes.....	6 Johns. 295.....	f 75
Devine v. Ducan.....	2 Abb. N. C. 328.....	403
Depew v. Depew.....	56 N. Y. 657.....	40
Dew v. Judges.....	3 Hen. & Man. 1.....	335
Dibble v. Dimick.....	15 St. Rep. 225.....	d 173
Dietz v. Farish.....	4 Super. Ct. 87.....	96
Diffenbach v. Roch.....	112 N. Y. 651; s. c.; 16 N. Y. Civ. Pro. 172.....	d and f 299
Dinsmore v. Adams.....	48 How. Pr. 274.....	13
Dinsmoor v. Commercial Trav- eler's Association.....	14 N. Y. Supp. 676; s. c.; 38 St. Rep. 524.....	f 125
Dintruff v. Tuthill.....	62 Hun, 591.....	d 307
Doan v. Holly.....	25 Mo. 357.....	359
Dodd v. Curry.....	4 How. Pr. 123.....	114
Doodsell v. Tel. Co.....	109 N. Y. 147.....	386
Douglass v. Ferris.....	138 N. Y. 192.....	f 344
Dreyfus v. Casey.....	52 Hun, 95.....	f 303
Duffus v. Cole.....	15 N. Y. Supp. 628; s. c.; 29 St. Rep. 833.....	f 120
Druckenmiller v. Shoninger.....	15 Daly, 477.....	f 93, 93
Durant v. Abendroth.....	48 Hun, 16.....	218, 219
Durant Land Imp. Co. v. Thomp- son-Houston, etc., Co.....	13 Daly, 337.....	f 33
Duycinck v. N. Y. E. R. R. Co.....	5 N. Y. Civ. Pro. 22.....	f 148

E.

Eaton v. Wells.....	32 N. Y. 576.....	209
Edson v. Dillaye.....	8 How. Pr. 273.....	f 296
Edwards v. U. S.....	103 U. S. 471.....	33
Elliot v. Wood.....	45 N. Y. 71.....	222
Ellsworth v. Campbell.....	31 Barb. 134.....	139
Erie Railroad Company v. Ramsey.....	45 N. Y. 654.....	f 120
Erwin v. Loper.....	43 N. Y. 520.....	d 129, 132, 133

TABLE OF CASES CITED.

xxiii

F.

Cases.	Where Reported.	Page Cited.
<i>Fasnacht v. Stehn</i>	53 Barb. 950.....	58
<i>Fassett v. Tallmadge</i>	14 Abb. Pr. 188.....	52
<i>Fassett v. Tallmadge</i>	15 Abb. Pr. 206.....	189
<i>Ferris v. Ferris</i>	56 N. Y. 614.....	40
<i>Field v. Field</i>	77 N. Y. 294.....	f 427
<i>Field v. Mayor</i>	6 N. Y. 179.....	f 268
<i>Fischer v. Raab</i>	81 N. Y. 235.....	f 125
<i>First National Bank v. Bushwick</i> Chemical Works.....	17 N. Y. Civ. Pro. 229.....	d 808
<i>Fisher v. Langbein</i>	108 N. Y. 89.....	245
<i>Flagg v. Swift</i>	25 Hun, 628.....	nf 23, 25
<i>Flake v. Van Wagnan</i>	54 N. Y. 25.....	38
<i>Foot v. Lathrop</i>	41 N. Y. 353.....	89
<i>Forstman v. Schulting</i>	42 Hun, 643.....	d 84
<i>Forstman v. Schulting</i>	110 N. Y. 110.....	f 86
<i>Fowler v. Kennedy</i>	3 Abb. Pr. 847.....	25
<i>Fox v. Erie Preserving Co.</i>	98 N. Y. 54.....	f 392
<i>Fox v. Jackson</i>	8 Barb. 355.....	75
<i>Frank v. Bush</i>	68 How. 282.....	402
<i>Fry v. Bennett</i>	9 Abb. 45.....	96
<i>Fullmer v. Fullmer</i>	6 N. Y. Weekly Dig. 22.....	104
<i>Furniture Co. v. Grumme</i>	10 Civ. Pro. 176.....	892

G.

<i>Gage v. Denbow</i>	49 Hun, 42.....	119
<i>Gardner Hall Mfg Co. v. Hall</i>	61 N. Y. 226.....	158
<i>Gardner, Matter of</i>	68 N. Y. 467.....	336
<i>Gate's Estate, In re</i>	21 Supp. 576.....	f 300
<i>Gawtrog v. Leary</i>	9 Daly, 353.....	156
<i>Genet v. D. & H. C. Co.</i>	113 N. Y. 475.....	96
<i>Germania Ins. Co. v. Dwight</i>	1 Hilt. 50.....	395
<i>Gilbert v. York</i>	111 N. Y. 544.....	209, 211, 212
<i>Glaucius v. Black</i>	50 N. Y. 145.....	f 175
<i>Glaucius v. Fogel</i>	88 N. Y. 444.....	182
<i>Glackin v. Zeller</i>	52 Barb. 147.....	291
<i>Goldberg v. Uteley</i>	60 N. Y. 427.....	357
<i>Gorman v. Board of Police</i>	35 Barb. 527.....	d 385
<i>Gould v. Cayuga Bank</i>	86 N. Y. 83.....	442, 447
<i>Grandin v. Leroy</i>	3 Paige, 509.....	449
<i>Gray v. Rothchild</i>	112 N. Y. 668.....	359
<i>Green v. Disbrow</i>	79 N. Y. 1.....	228
<i>Gregory v. Fichtner</i>	21 N. Y. Civ. Pro. 1.....	324
<i>Griggs v. Day</i>	18 N. Y. Supp. 796.....	f 47
<i>Gunn v. Gunn</i>	58 Am. Rep. 447.....	228

H.

Cases.	Where Reported.	Page Cited.
<i>Hackley v. Hope</i>	4 Keyes, 123.....	879
<i>Hæbler v. Myers</i>	133 N. Y. 363.....	84, d 87
<i>Hale v. Morse</i>	49 Conn. 481.....	227
<i>Hall v. Brooks</i>	89 N. Y. 83.....	879
<i>Halpin v. Phoenix Ins. Co.</i>	118 N. Y. 172.....	174, 226
<i>Hammond v. Machine Co.</i>	11 How. Pr. 29.....	193
<i>Hammond v. Morgan</i>	101 N. Y. 179.....	f 323
<i>Hammond v. Scofield</i>	L. R., 1 Q. B. Div. 453.....	14
<i>Harden v. Coleman</i>	42 Supr. C. 256.....	177
<i>Harris v. Eldridge</i>	5 Abb. N. C. 278.....	357
<i>Harper v. Failey</i>	53 N. Y. 442.....	227
<i>Hart v. Albright</i>	28 Abb. N. C. 74.....	254
<i>Hart v. Mayor, etc.</i>	69 Hun, 237; s. c.; 23 N. Y. Supp.....	555, 207
<i>Harwood v. Marshall</i>	9 Md. 83.....	335, 336
<i>Hatch v. Central Nat. Bank</i>	78 N. Y. 487.....	96
<i>Hawks v. Munger</i>	2 Hill, 200.....	25
<i>Hawley v. Bennett</i>	4 Paige, 64.....	f 120
<i>Heckeman v. Young</i>	45 St. Rep. 846.....	13
<i>Herbage v. City of Utica</i>	14 N. Y. Civ. Pro. 79.....	f 71
<i>Herman v. Stalp</i>	17 Civ. Pro. 172.....	nf 299
<i>Herder v. Collyer</i>	22 Abb. N. C. 461, 513.....	f 298
<i>Hess, In re</i>	48 Hun, 586.....	52
<i>Hess v. Buffalo & Niagara R. R. Co.</i>	29 Barb, 391, 357.....	358
<i>Higgins v. Critchton</i>	11 Daly, 114.....	358
<i>Higgins v. Freeman</i>	2 Duer, 652.....	f 347
<i>Hindmarsh v. Southgate</i>	3 Russ. 324.....	f 314, 315
<i>Hinds v. C. & N. F. R. R. Co.</i>	10 How. Pr. 487.....	194, 249
<i>Hogan v. Hoyt</i>	37 N. Y. 300.....	96
<i>Hogg v. Smith</i>	17 N. Y. Civ. Pro. 128.....	174
<i>Holmes v. Evans</i>	129 N. Y. 140.....	442
<i>Home Ins. Co. v. Pennsylvania R. Co.</i>	11 Hun, 182.....	108
<i>Hood v. Hood</i>	85 N. Y. 561.....	132
<i>Horton v. McCoy</i>	47 N. Y. 533.....	372
<i>House v. Lockwood</i>	48 Hun, 550.....	218
<i>Howard v. Shipman</i>	6 Barb. 621.....	26
<i>Howell v. Van Sicklen</i>	4 Abb. N. C. 1; aff'd 8 Hun, 524.....	218
<i>Hudson v. Spaulding</i>	25 St. Rep. 256; s. c. 6 N. Y. Supp. 877.....	f 25
<i>Hughes v. Mulvy</i>	1 Sandf. 92.....	75
<i>Hughes v. Stikey</i>	13 Wend. 280.....	379
<i>Humbert v. Abeel</i>	7 N. Y. Civ. Pro. 417.....	f 24, f 25
<i>Hunt v. Rousmanier</i>	8 Wheat, 174.....	440, 442
<i>Hutchings v. Hebbard</i>	34 N. Y. 24.....	442
<i>Hyman v. Friedman</i>	14 St. Rep. 636, aff'd. 138 N. Y. 639.....	d 172

TABLE OF CASES CITED.

xxv

I.

Cases.	Where Reported.	Page Cited.
Improvement Co. v. Staley.....	40 Super. Ct. 539.....	440
Idley v. Bowen.....	11 Wend. 227	379
Inman v. Western Fire Ins. Co....	12 Wend. 452.....	f 400
Innes v. Purcell.....	58 N. Y. 388.....	38
Insurance Co. v. Dwight.....	1 Hilt. 50.....	395
Jacobs v. Morange.....	47 N. Y. 57	f 18
Ireland v. Nichols.....	40 How. Pr. 85.....	f 35

J.

Jagger v. Cunningham.....	8 Daly, 511.....	96
Jenkins v. Putnam.....	106 N. Y. 272.....	39, 70 note
Jenson v. Bank.....	85 N. Y. 546	112
Johnson v. Albany, &c. R. R. Co.	54 N. Y. 416	f 298
Johnson v. Buckel.....	20 N. Y. Supp. 566.....	d 307
Johnson v. Hale.....	3 Stew. & P. 331	309
Johnson v. Kirby.....	65 Cal. 482.....	359
Johnson v. Shelter Island Ass'n	122 N. Y. 330	182
Jones v. Sherman.....	8 N. Y. St. Rep. 344.....	f 66
Jooss v. Fay.....	129 N. Y. 23.....	f 283
Juch, Estate of.....	17 N. Y. Supp. 910.....	d 129, 133
Johnson v. O'Connell.....	14 N. Y. Supp. 92	40
J. W. B. v. F. D. B.....	11 N. Y. Leg. obs. 350.	104

K.

Keller v. Feldman.....	23 N. Y. Civ. Pro. 87.....	f 57
Kellett v. Rathbun.....	4 Paige, 102.....	379
Kelly v. Israel.....	11 Paige, 147.....	379
Kelly v. Miles.....	48 Hun, 6.....	34
Kelly v. Neumann.....	62 How. Pr. 156.....	358
Ketcham v. Zerega.....	1 E. D. Smith, 658.....	d 58
Kincaid v. Richardson.....	25 Hun, 237	f 298
King v. Flynn.....	37 Hun, 329	121
Kingland v. Braisted	2 Lans. 17.....	25
Kinnier v. Rogers.....	42 N. Y. 531.....	132
Kirk v. Blashfield.....	6 T. & C. 509.....	d 294
Knapp v. Alvord.....	10 Paige, 205.....	442
Knapp v. Brooklyn	97 N. Y. 520.....	142
Knieling v. Lennon.....	22 N. Y. Supp. 775.....	f 296
Knox v. Nobel.....	23 Civ. Pro. 311	a 429
Koehler v. Farmers' and Drovers'		
National Bank.....	17 N. Y. Civ. Pro. 307..	f 119, 120

L.

Lane v. Humbert.....	9 N. Y. Supp. 744.....	141
Lane v. Young.....	66 Hun, 563.....	416

H.

Cases.	Where Reported.	Page Cited.
Laney v. Laney	11 N. Y. Supp. 819.....	392
Latteman v. Ferre.....	11 Civ. Pro. 217.....f 92, 93,	364
Lattimore v. Livermore	72 N. Y. 174.....	183
Lawrence v. Farley	73 N. Y. 187.....	89
Loew, Matter of.....	90 N. Y. 666.....	40
Leroy v. Platt.....	4 Paige, 77.....	449
Leslie v. Leslie.....	11 Abb. Pr. N. S. 311.....	104
Logan v. Logan.....	2 B. Mon. 142.....	105
Luddington's Petn.....	5 Abb. N. C. 307.....	252
Ludwig v. Minot.....	4 Daly, 481.....	nf 92
Lyon v. Manly.....	10 Abb. 337.....f	300
McCleary v. McCleary.....	30 Hun, 154.....	390
McComb, Matter of.....	117 N. Y. 378.....	129, 132
McCormack v. Pennsylvania R. R.....	49 N. Y. 803.....	d 350
McCrocklin v. McCrocklin.....	2 B. Mon. 370.....	105
McDonald v. Rieferdorf.....	22 N. Y. Civ. Pro. 105.....	d 307
McEteere v. Little.....	8 Daly, 167.....	40
McIntyre v. Hernandez.....	7 Abb. Pr. N. S. 214.....	222
McIvor v. McCabe.....	16 Abb. Pr. 319.....	108
Mackellar v. Rogers.....	109 N. Y. 468, affirming 52 N. Y. Super. 468.....	105, d 410
McKelsey v. Lewis.....	44 N. Y. Super. 561, affirmed 38 N. Y. 257.....	96
McLean v. Spratt.....	20 Fla. 515.....	82
McMahon v. Rauhr.....	47 N. Y. 67.....	38
Main Street, etc., <i>In re</i>	98 N. Y. 454.....	142
Maltby v. Green.....	1 Keyes, 548.....	38
Manning v. Winter.....	7 Hun, 482.....	187
Manufacturing Co. v. Thayer.....	82 N. Y. 610.....	143
Marbury v. Madison.....	1 Cranch, 137.....	334
Marie v. Garrison.....	13 Abb. N. C. 317.....	187
Mars v. Albany Savings Bank.....	62 Hun, 424.....	d 304
Mars v. Albany Savings Bank.....	69 Hun, 398.....	305
Martine v. Lowenstein.....	68 N. Y. 456.....	347
Martin v. Windsor Hotel Co.....	70 N. Y. 10.....	10, 103, 39
Matthews v. Matthews.....	58 Hun, 244.....	390
Maxwell v. Pratt.....	24 Hun, 448.....	25
Mayor v. N. Y. & S. I. Ferry Co.....	40 Super. Ct. 300; s. c., aff'd 64 N. Y. 623.....	119
Messenger v. Bank.....	6 Daly, 190.....	156
Middleton v. Middleton.....	2 Hagg. Ecc. Supp. 184.....	105
Miller v. Tyler.....	58 N. Y. 477.....	40
Miller v. White.....	50 N. Y. 141.....	58
Milner v. Milner	2 Edw. Ch. 114.....	104
Moffat v. Herman.....	116 N. Y. 181.....f 122, d	331

TABLE OF CASES CITED.

xxvii

Cases.	Where Reported.	Page Cited.
<i>Money v. Tracey</i>	92 N. Y. 581.....	f 35
<i>Mora v. Great Western Ins. Co.</i> ...	10 Bosw. 622.....	114
<i>Morange v. Morange</i>	2 N. Y. Law Bul. 80	104
<i>Murphy v. Telegraph Co</i>	9 N. Y. Supp. 28.....	219
<i>Murray v. Gibson</i>	22 Hun, 386.....	207
<i>Murtha v. Curley</i>	92 N. Y. 359.....	219
<i>Mutual Life Ins. Co. v. Hoyt</i>	15 Weekly Dig. 489.....	267
<i>Myers v. Becker</i>	95 N. Y. 436.....	52

N.

<i>Nassau Bank v. Yandes</i>	44 Hun, 55.....	d 808
<i>Nelson v. Railroad Co.</i>	28 N. Y. Supp. 50.....	324
<i>Newberger v. Campbell</i>	9 Daly, 102.....	70
<i>N. Y. Central Ins. Co. v. Nat'l Pro-</i> <i>tection Ins. Co.</i>	20 Barb. 468.....	f 400
<i>New York L. & W. R. R. Co.</i> <i>In re</i>	98 N. Y. 452.....	222
<i>Nichols v. Drew</i>	94 N. Y. 22.....	357
<i>Nichols v. McLean</i>	101 N. Y. 526.....	336

O.

<i>Oakley v. Aspinwall</i>	3 N. Y. 552.....	294
<i>Oakley v. Sears</i>	7 Robt. 111, 113.....	156
<i>Oakville Co. v. The Track Co.</i> ...	105 N. Y. 658.....	449
<i>O'Brien v. The Mechanics' &</i> <i>Traders' Fire Insurance Co.</i> ...	56 N. Y. 55.....	f 340
<i>Odell v. McComack</i>	L. R. 19 Q. B. Div. 233.....	14
<i>O'Gora v. Kearnet</i>	77 N. Y. 426.....	d 84
<i>Oicott v. Kohlsaat</i>	8 N. Y. Supp. 116.....	325
<i>Oliwill v. Ferdenthalven</i>	7 N. Y. Supp. 99.....	207
<i>Ostrander v. Weber</i>	114 N. Y. 95.....	449
<i>Otten v. Bubling</i>	4 Law Bull. 63.....	f 298

P.

<i>Palmer v. Van Orden</i>	49 Super. Ct. 89.....	139
<i>Parker v. Eaton</i>	25 Barb. 122.....	291
<i>Parker v. Lythgoe</i>	13 N. Y. Supp. 949.....	112
<i>Peck v. Ormsby</i>	28 N. Y. S. R. 518.....	165, 167
<i>Pecks v. Yorks</i>	75 N. Y. 421	189, 190
<i>Penniman v. Fuller & Warren Co.</i>	22 N. Y. Civ. Pro. 205	f 407
<i>People v. A. & S. R. R. Co</i>	49 How. Pr. 89 S. C. 8 Abb. Pr. N. S. 122.....	54
<i>People ex rel Kelly v. Atken</i>	19 Hun, 329.....	125
<i>People v. Bancker</i> ...	5 N. Y. 106.....	331
<i>People ex rel King v. Barnes</i>	113 N. Y. 476.....	119 f 121
<i>People v. Booth</i>	32 N. Y. 397.....	329

Cases.	Where Reported.	Page Cited.
People v. Bowe.....	81 N. Y. 45.....	14
People v. Browere.....	4 Paige 405.....	119
People v. Brooks.....	40 How. Pr. 165.....	331
People v. Church	2 Lans. 259 S. C. 57 Barb. 204..	54
People v. Commissioners of High- ways.....	54 N. Y. 276.....	440
People v. Compton.....	1 Duer, 512 aff'd 9 N. Y. 263 f	120
People <i>ex rel</i> Lower v. Donevan 63 Hun, 512 S. C. 45 St. Rep. 141	18 N. Y. Supp. 501.....r	1
People <i>ex rel</i> Negus v. Dwyer....	2 N. Y. Civ. Pro. 870.....f	119
People v. Ferris.....	76 N. Y. 326.....	336
People v. Gilmore.....	88 N. Y. 626.....f	118
People v. Goetting.....	133 N. Y. 569.....	336
People <i>ex rel</i> v. Green.....	58 N. Y. 296.....	6, 7
People v. Hamilton.....	39 N. Y. 107.....	421
People v. Lane.....	55 N. Y. 217.....	336
People v. McAdam.....	84 N. Y. 287.....	419
People v. McAdam.....	2 Civ. Pro. 52.....	420
People v. Mayor.....	10 Wend. 393 ..	f 77
People v. New York.....	3 Johns. 79.....	336
People v. Nichols.....	97 N. Y. 258.....	419
People v. Parker.....	1 N. Y. Civ. Pro. 444.....	419
People v. Steinberg.....	9 Alb. L. Jour. 411.....	419
People v. Stevens.....	5 Hill, 616.....	336
People v. Supervisors.....	12 Johns. 415	f 77
People v. Vail.....	20 Wend. 12 ..	336
People v. Vilas.....	36 N. Y. 459.....	415
People v. Wendell.....	57 Hun, 362.....	336
People v. Willis.....	8 Abb. Pr. 212	79
Pfandler Barm Extracting Bung- ing Apparatus Co. v. Sargent....	43 Hun, 154.....	f 47
Phelps, <i>In re</i>	6 Misc. 397.....	nf 300
Phelps v. Swan.....	2 Sweeny, 696	395
Phipps v. Carman.....	26 Hun, 518.....	f 66
Phipps v. Van Cott.....	15 How. Pr. 110.....	f 296
Pitcher v. Robertson.....	21 N. Y. Supp. 66.....	207
Pitt v. Davidson.....	37 N. Y. 235.....	d 51
Plank Road Co. v. Parker.....	22 Barb. 323	294
Popfinger v. Yutte.....	103 N. Y. 38... ..	108, f 109, 224
Pottery, Farrington.....	24 Hun, 551	f 340
Powers, <i>In re</i>	124 N. Y. 361.. 129, d 131, 132, 133	
Pracht v. Ritter.....	48 N. Y. Super. 509.....	358
Pratt v. Myers.....	18 N. Y. Supp. 466.....	f 303
Prevost v. Farley.....	13 Hun, 303	98
Q.		
Quimbo Appo v. People.....	20 N. Y. 531.....	419

TABLE OF CASES CITED.

xxix

R.

Cases.	Where Reported.	Page Cited.
<i>Railway Co. v. Ramsey</i>	45 N. Y. 647.....	222, 224
<i>Randall v. Dusenbury</i>	51 How. Pr. 367; affirmed 41 N. Y. Super. Ct. 456....	52
<i>Rankin v. Pine</i>	4 Abb. Pr. 309.....	304
<i>Raymond v. Richmond</i>	76 N. Y. 106.....	143
<i>Raymond v. Squire</i>	11 Johns. 47.....	442
<i>Read v. McConnell</i>	133 N. Y. 425.....	f 344
<i>Redmond v. Hoge</i>	8 Hun, 171.....	194
<i>Reid v. Vanderheyden</i>	5 Cow. 719.....	379
<i>Remsen v. Wheeler</i>	8 Silvernail, Ct. App. 43.....	236
<i>Rensons v. Clark</i>	5 Mich. 414.....	227
<i>R. F. H. v. S. H.</i>	40 Barb. 9.....	104
<i>R. H. & L. R. R. Co. v. N. Y. L. E. & W. R. R. Co.</i>	48 Hun, 190.....	119, 120
<i>Rhodes v. Linderman</i>	17 N. Y. Supp. 628; s. c.; 43 St. Rep. 520.....	f 120
<i>Rider v. Roach</i>	97 N. Y. 378.....	358
<i>Ritten v. Griffith</i>	16 Hun, 454.....	d 200
<i>Robert Gere Bk. v. Inman</i>	51 Hun, 97.....	f 58
<i>Roberts v. Doty</i>	31 Hun, 128.....	207
<i>Robertson v. Robertson</i>	9 Daly, 44.....	402, 403
<i>Robinson v. Cornish</i>	12 N. Y. Supp. 929.....	40
<i>Robinson v. Oceanic S. Nav. Co.</i>	15 N. Y. Civ. Pro. 18; affirmed 16 Id. 225.....	f 109, f 351
<i>Rodrigas v. Bank</i>	63 N. Y. 460.....	433
<i>Rogers v. Degan</i>	10 Abb. Pr. 314.....	114
<i>Romeyn v. Sickles</i>	108 N. Y. 650; s. c.; 1 Silvernail Ct. App. 594....	f 342, f 343, 378
<i>Root v. Van Dusen</i>	32 Hun, 63.....	207
<i>Rose v. Henry</i>	37 Hun, 397.....	f 298
<i>Ross v. Butler</i>	19 N. Y. Civ. Pro. 152.....	52
<i>Ross v. Ross</i>	31 Hun, 140.....	390
<i>Rothchild v. Railway Co.</i>	10 N. Y. Supp. 86.....	392
<i>Rothwell v. Paine</i>	9 Civ. Pro. 128.....	150
<i>Russell v. Ruckman</i>	3 E. D. Smith, 419.....	f 364
<i>Ryerson v. Ryerson</i>	7 N. Y. Supp. 726.....	390

S.

<i>Salomon v. Heichel</i>	4 Dem. 176.....	427
<i>Salter v. Parkhurst</i>	2 Daly, 240.....	92
<i>Sanders v. Townshend</i>	11 Abb. N. C. 217.....	219
<i>Sandford v. Sandford</i>	9 N. Y. Civ. Pro. 289.....	f 125
<i>Sands v. Gelston</i>	15 Johns. 511.....	227
<i>Sargent v. Sargent Granite Co.</i>	52 St. Rep. 517.....	183
<i>Schwarz v. Weber</i>	103 N. Y. 658.....	394

TABLE OF CASES CITED.

Cases.	Where Reported.	Page Cited.
Schroeter v. Schroeter.....	28 Hun, 230.....	390
Schuyler v. Englert.....	10 Daly, 463.....	150
Scofield v. Whitelegge.....	49 N. Y. 259.....	440
Scott v. Stockwell.....	65 How. Pr. 249.....	440
Selover v. Coe.....	63 N. Y. 438.....	428
Seneca Bank v. Garlinghouse.....	4 How. Pr. 174.....	400, 402
Seneca Nation v. Hawley.....	32 Hun, 288.....	98
Shaffer v. Risley.....	114 N. Y. 23.....	331
Sheehan v. Butler.....	24 Weekly Dig. 168.....	258
Shearman v. Pope.....	106 N. Y. 664; s. c., 12 N. Y. Civ. Pro. 329.....	367
Shephard v. Railroad Co.....	131 N. Y. 215.....	224
Sheridan v. Genet.....	1 Civ. Pro. 309.....	219
Sherwood v. Buffalo, etc., R. R. Co.	12 How. Pr. 186.....	194, 249
Siegrist v. Holoway.....	7 N. Y. Civ. Pro. 58.....	218
Simmons v. Hazard.....	33 N. Y. State Rep. 836.....	f 17
Sinclair v. Hollister.....	41 St. Rep. 350.....	14, 13
Skinner v. White.....	69 Hun, 127.....	f 296
Smith v. Belden.....	60 N. Y. 642.....	40
Smith v. Monroe.....	38 Conn. 105.....	78
Smith v. Platt.....	96 N. Y. 635.....	39
Smith v. Smith.....	4 Paige 432.....	104
Smith v. Talmadge.....	3 N. Y. Law Bul. 97.....	112
Smith v. Union Milk Co.....	70 Hun, 348.....	f 350
Smith v. White.....	23 N. Y. 572.....	92, 94
Southwick v. First National Bank of Memphis.....	84 N. Y. 420.....	342
Sperry v. Hellman.....	20 Civ. Pro. R. 218.....	f 239
Sperry v. Reynolds.....	65 N. Y. 179.....	75
State v. Dunn.....	12 Am. Dec. 28.....	335
Steele v. White.....	2 Paige, 478.....	379
Stephens v. Page.....	23 Civ. Pro. 191.....	246
Stevens v. Glover.....	83 N. Y. 611.....	33, 40
Stevens v. Mayor.....	84 N. Y. 304.....	442, 447
Strong v. Strong.....	3 Robt. 669; s. c., 28 How. Pr. 432.....	104
Stubbs v. Ripley.....	39 Hun, 627.....	f 118
Sutorius v. North.....	20 Civ. Pro. R. 162.....	f 239
Swenarton v. Shupe, <i>In re</i>	9 N. Y. Civ. Pro. 402.....	f 125

T.

Talcott v. City of Buffalo.....	125 N. Y. 280.....	f 125
Taylor v. Manhattan.....	53 Hun, 305.....	358
Third Avenue R. R. Co. v. Mayor.....	54 N. Y. 159.....	89
Thomas v. Evans.....	Hun, 442.....	218
Thompson v. Kearney.....	12 St. Rep. 682.....	148

TABLE OF CASES CITED.

xxxi

Cases.	Where Reported.	Page Cited.
Thompson v. Shepard.....	9 Johns. 262.....	89
Thorn v. Beard.....	14 N. Y. Supp. 339; s. c., 89 St. Rep. 30, revised 32 N. E. Rep. 141.....	190
Tibbits v. Percy.....	24 Barb. 89.....	358
Titus v. The Board of Police.....	85 Barb. 527.....	d 335
Town of Menz v. Cook.....	108 N. Y. 504.....	449
Townsend v. Tolhurst.....	10 N. Y. Civ. Pro. 1..f 298, 299, 300	
Traitteur v. Levingston.....	18 N. Y. Supp. 602.....	40
Trascott v. King.....	6 N. Y. 147.....	449
Trust Co. v. Whiton.....	17 Hun, 593.....	218
Turner v. Weston.....	133 N. Y. 650.....	226
Taylor v. Hornback.....	43 Barb. 197.....	156

U.

Uline v. N. Y. Central & H. R. R. Co.....	79 N. Y. 175.....	f 100
--	-------------------	-------

V.

Van Alstyne v. Erwine.....	11 N. Y. 331... ..	f 310
Vanderbilt v. Schreyer.....	81 N. Y. 646.....	13
Vanderwerken v. Brown.....	23 Hun, 234.....	f 258
Van Etten v. Van Etten.....	66 Hun, 499.....	419
Van Gelder v. Hallenbeck.....	15 N. Y. Civ. Pro. 333... ..	114
Van Orsdall v. Hazard.....	3 Hill, 243.....	83
Van Rensselaer v. Brice.....	4 Paige, 177.....	f 187
Van Slyke v. Hyatt.....	46 N. Y. 259.....	365
Vilas v. Chase.....	19 N. Y. Civ. Pro. 333.....	f 75
Vose v. Cockcroft.....	44 N. Y. 415.....	222

W.

Wade v. DeLeyer.....	63 N. Y. 318.....	40
Wainwright v. Low.....	49 Hun, 933 s. c., 1 N. Y. Supp. 786.....	112
Wakefield v. Amer. & Co. Co.....	18 Daly, 349.....	40
Walker v. Scott.....	3 Misc. 329 s. c., 23 N. Y. Supp. 334; 23 Civ. Pro. 90.....	364
Walsh v. Schulz.....	12 Daly, 106.....	40
Waltermire v. Westover.....	14 N. Y. 16.....	f 298, 299
Ward v. James.....	8 Hun, 526.....	36
Ward v. Kilpatrick.....	85 N. Y. 413.....	29
Ward v. Railroad Co.....	42 How. Pr. 701.....	395
Ward v. Ward.....	23 N. Y. Civ. Pro. 61.....	f 67
Warner v. Fourth Nat. Bank.....	115 N. Y. 251.....	f 339
Warner v. Myers.....	4 Ore. 72.....	335
Washburn v. Mott.....	12 N. Y. Supp. 111.....	207
Water Com's of Amsterdam In re.....	104 N. Y. 677 s. c., 10 N. E. Rep. 545.....	219

Cases.	Where Reported.	Page Cited.
<i>Waters v. Curtus</i>	18 Daly, 179.....	355
<i>Watts v. Adler</i>	130 N. Y. 95.....	449
<i>Watts v. Wilcox</i>	17 N. Y. Supp. 647; aff'd 138 N. Y. 672.....	f 68
<i>Webb v. Webb</i>	1 Hagg. Ecc. 349.....	105
<i>Webster v. Bond</i>	9 Hun, 437.....	223
<i>Webster v. Stockwell</i>	8 Abb. N. C. 115.....	70 note.
<i>Weed v. Weed</i>	94 N. Y. 243.....	f 18
<i>Wehle v. Connor</i>	83 N. Y. 231.....	207
<i>Weil v. Martin</i>	1 Civ. Pro. Rep. 133.....	96
<i>Wellington v. Classon</i>	18 How. Pr. 10.....	347
<i>Weston v. Hodgkins</i>	136 Mass. 326.....	227
<i>Wheelock v. Lee</i>	74 N. Y. 498.....	105, 347, 449
<i>Wheelock v. Noonan</i>	55 Superior Ct. 23 J. & S. 305.....	f 125
<i>White, Matter of</i>	12 Abb. N. C. 348.....	419, 421
<i>Whitney v. Town of Ticonderoga</i>	6 N. Y. Supp. 844.....	438
<i>Whitney v. Townsend</i>	67 N. Y. 40.....	355
<i>Wigand v. Sichel</i>	3 Keyes 120.....	25
<i>Williams v. Aetna Life Ins. Co.</i>	8 N. Y. St. Rep. 567.....	nf 304
<i>Williams v. Montgomery</i>	60 N. Y. 648.....	156
<i>Williams v. Saunders</i>	5 Cold. 60.....	78
<i>Wills v. Suydam</i>	64 N. Y. 873.....	357
<i>Wilson v. Troup</i>	2 Cow. 195.....	442
<i>Wise v. Strauss</i>	39 St. Rep. 78.....	27
<i>Wiswall v. Hall</i>	3 Paige, 313.....	449
<i>Witherhead v. Allen</i>	4 Abb. Ct. App. Dec. 28.....	de. nf 24
<i>Witkowski v. Paramore</i>	93 N. Y. 467.....	39
<i>Wood v. Lary</i>	20 N. Y. Civ. Pro. 136.....	209
<i>Wordsworth v. Lyon</i>	5 How. Pr. 463.....	419
<i>Worster v. Chamberlain</i>	23 Barb. 602.....	25
<i>Wright v. Delafield</i>	25 N. Y. 266.....	385
Y.		
<i>Yale Co. Nat. Bank v. Carpenter</i>	119 N. Y. 550.....	f 165
<i>Yeandle v. Yeandle</i>	16 N. Y. Supp. 49.....	325
Z.		
<i>Zieglar v. Chapin</i>	126 N. Y. 348.....	f 125
<i>Zorn v. Zorn</i>	Hun, 67.....	357

STATUTES, ETC., CITED.

SECTIONS OF THE CODE OF CIVIL PROCEDURE.

Section	Page	Section	Page
4.....	24, 318	549.....	152
8.....	6, 118	550.....	152
9.....	118, 125	559.....	151, 239
14..86, 87, 119, 120, 121, 122, 124, 125, 126, 263, 381		636, subd. 2.....	307
66.....	263	641.....	307
263, subd. 7.....	108, 109	658.....	398, 399, 400
321.....	189	682.....	252
340.....	212, 213, 215	688.....	340
382.....	233, 234, 298, 299	723.....	180, 344
386.....	227	724.....	13
395.....	227	768.....	9
416.....	320	770.....	7, 9
424.....	347	779.....	84, 150
456.....	12	780.....	351
458.....	366	783.....	139
459.....	366	789-795.....	354
469.....	367	817.....	81
431.....	236	820.....	302, 303, 304, 305
434.....	357	870.....	71
499.....	312	872.....	68, 70 note, 71
500.....	58	873.....	68, 70 note, 71
501.....	158, 187	891.....	817
507.....	187	893.....	112
508.....	186, 187	894.....	112
514.....	440	970.....	412
516.....	440	974.....	412
519.....	438	983 subd. 2.....	203
522.....	440	984.....	405, 406
518.....	237	993.....	173
542.....	402	999.....	26, 42
544.....	103, 364, 402	1002.....	216
545.....	54	1010.....	209
		1021.....	209

Section	Page	Section	Page
1228.....	887	2262.....	86
1229.....	886, 889	2265.....	222
1287.....	237	2266.....	126
1240.....	85	2281.....	122, 123, 125
1241.....	51, 85	2284.....	122, 381, 382
1278.....	12	2285.....	121, 122
1290.....	18	2435.....	250
1291.....	13	2452.....	250
1298-1323.....	142	2458.....	179, 193, 250
1294.....	88, 378	2468.....	192, 198, 250, 251
1310.....	85	2465.....	250, 251
1326.....	141	2660.....	481
1340-1345.....	142	2749.....	129, 136
1341.....	141, 142	2868.....	93, 291
1347.....	142	2918.....	230
1377.....	398	2934-2944.....	364
1393.....	165	2944.....	92, 364
1404.....	167	2945-2950.....	93
1532.....	282, 283	2950.....	291
1638.....	327, 328	2952.....	420
1639.....	329	2956.....	416
1699.....	6	3017.....	299
1704.....	6	3020.....	299
1730.....	323, 324	3063.....	231, 232
1770.....	103	3068.....	292
1775.....	391	3070.....	260
1776.....	382	3191.....	39
1780.....	108, 352	3191-3194.....	141
1788.....	360	3192.....	142
1810.....	192, 193, 250	3193.....	142, 378
1812.....	192, 193, 250	3194.....	141, 142
1822.....	427	3215.....	93
1848.....	447	3228.....	217
1919.....	24	3232.....	150, 285
1922.....	24	3233.....	150
1923.....	24, 25, 126	3236.....	217, 218
1991.....	419	3247.....	189
2017.....	8	3251.....	66, 67, 217
2068.....	8, 9	3253.....	181
2086.....	9	3256.....	47, 64
2203.....	332	3273.....	239
2208.....	332	3296.....	47
2231 subd. 3.....	34	3297.....	237
2244.....	222	3339.....	447
2248.....	79	3343.....	87, 142
2249.....	77	3347 subd. 4.....	364
2251.....	79		

SECTIONS OF THE CODE OF PROCEDURE
CITED.

Section.	Page.
125	406
139.....	347
235.....	339
321.....	189
401.....	7
471... ..	7

SESSION LAWS CITED.

Laws of 1842, chap. 180, tit. 1, § 5	9
“ 1847, “ 240, § 2	9
“ 1849, “ 258	24
“ 1853, “ 153, § 4	24
“ 1857, “ 344, § 3	93
“ 1857, “ 344, § 30	75
“ 1862, “ 484	75
“ 1873, “ 70	420
“ 1873, “ 239	7
“ 1875, “ 611, § 84	57
“ 1876, “ 431	141
“ 1880, “ 178, ch. 12, tit. 1 and 3	141
“ 1882, “ 410	27
“ 1882, “ 410, § 1285	93
“ 1882, “ 410, § 1343	93
“ 1882, “ 410, § 1347	92, 364
“ 1882, “ 410, § 1361	93
“ 1882, “ 410, § 1380	26, 93
“ 1882, “ 410, § 1383	74
“ 1882, “ 410, § 1383	93
“ 1882, “ 410, § 1432	334
“ 1890, “ 450	141
“ 1890, “ 450, § 7	143
“ 1891, “ 210	327
“ 1892, “ 185	47
“ 1892, “ 418, § 2	340
“ 1892, “ 557, § 1	334
“ 1892, “ 592	47
“ 1893, “ 705	420

NEW YORK REVISED STATUTES CITED.

2 R. S. p. 608	7
2 R. S. (3 ed.) p. 259, § 1	6

SECTIONS OF NEW YORK CITY CONSOLIDATION ACT CITED.

	Page.
§ 1285.....	93
§ 1343.....	93
§ 1347.....	92, 364
§ 1361.....	93
§ 1390.....	26, 93
§ 1392.....	74
§ 1393.....	93
§ 1432.....	334

ENGLISH STATUTES CITED.

1 Hy. VIII. ch. 1.....	233
1 Hy. VIII. ch. 82.....	233
8 and 9 Wm. III. ch. 31.....	234

GENERAL RULES OF PRACTICE CITED.

Rule 31.....	411
Rule 33.....	394, 395
Rule 35.....	394, 395
Rule 40.....	395
Rule 49.....	367
Rule 54.....	375
Rule 59.....	375

CHANCERY RULES CITED.

Rule 191.....	103
---------------	-----

TEXT-BOOKS, ETC., CITED.

Abbott's Ann. Dig. 1887, p. 92, par. 37.....	218
Abbott's Brief on Pleadings, p. 238.....	359
Abbott's Brief on Pleadings, p. 302, § 1027.....	385
Allnat on Partition, p. 55.....	233
3 Am. & Eng. Enc. Law, p. 788.....	6
- Am. & Eng. Enc. Law, p. 1144.....	285
10 Am. & Eng. Enc. Law, p. 651.....	314
15 Am. & Eng. Enc. Law, p. 336.....	34
17 Am. & Eng. Enc. Law, p. 169.....	33
17 Am. & Eng. Enc. Law, p. 679.....	284
Baylies' Code Pleading ch. 13, p. 237.....	440

STATUTES, ETC., CITED.

xxxvii

Baylies' New Tr. & App. 217	89
Baylies' New Tr. & App. 573	178
2 Barb. Ch. Pr. 255	108
Bates on Partn. §§ 84, 921.	185
Bishop on Ins. Debtors (2 ed.) 87.	381
Bishop on Mar. Div. & Sep. § 559.	105
2 Blacks. Com. 110.	6, 334
2 Blacks. Com. 117.	14
3 Blacks. Com. 442.	54
Browne on Div. & All. 53.	105
Burrill's Law Dic. "Evidence".	178
1 Burrill's Pr. 444.	318
Buswell on Lm, § 77.	227
Cowan's Treat. § 650.	26
1 Daniel's Chy. Pr. § 347.	54
Drake on Attcht. §§ 101, 102.	308
End. Interp. Stat. p. 115, § 85.	142
Fiero Spec. Proc. 519.	194
Graham's Prac. (2 ed.) 296.	108
Graham's Prac. (3 ed.) 596.	318
2 Greenl. Laws, p. 18.	284
High on Ex. Leg. Rem. §§ 49, 67.	384, 385
Hill, on Inj. (3 ed.) 660 § 4.	222
Kent's Com. (6 ed.) p. 364.	284
Kneeland on Attacht. § 215.	309
1 Kyd on Corpn. ch. 2, § 4.	38
Langbein Dist. Ct. Prac. (ed. 1872) p. 38.	98
McAdam on Landlord and Tenant (2d ed.) pp. 205, 706.	420
Moses on Mand. 16.	6
Moses on Mand. 150.	334
Parson on Part. 14.	185
1 Rumsey's Prac. 236.	89
2 Rumsey's Prac. 442.	218
3 Stephen's Com. 316.	14
Story's Eq. Juris. § 651.	284
Story's Eq. Pleading, §§ 266, 862.	54
Story's Eq. Pleading, § 903.	108
Suth. St. Const. § 257.	142
Throop's Code (ed. 1881), p. 210.	24
2 Tillinghast & Shearman, Pr. 392.	318
1 Van Santvoord's Eq. Pr. (2 ed.) 289.	318
2 Wait's Prac. 187.	310
2 Wait's Prac. 302.	320
Webster's Imp. Dic. "Evidence".	178
Wells on Res. Adjudicata, §§ 82, 67.	252
Willard's Eq. Juris. 699, 700.	284
Willcock on Corp. 239.	38
Wood on Lien, § 97.	227

SECTIONS OF THE CODE OF CIVIL PRO- CEDURE.

CONSTRUED OR CITED IN THE FOLLOWING REPORTS,
ISSUED DURING THE PERIOD COVERED BY THIS
VOLUME: New York Reports, Vols. 134-141, in-
clusive; Hun's Reports, Vols. 67-75, inclusive;
Delahanty's Misc. Reports, Vols. 1-6, inclusive;
and New York Civil Procedure Reports, Vol. 23.

4	Krauss v. Hallbelmer.....	28 N. Y. Civ. Pro. 317.
8	People <i>ex rel.</i> Lower v. Donovan.....	28 N. Y. Civ. Pro. 1.
8	Boone v. McGucken.....	28 N. Y. Civ. Pro. 115.
9	Boone v. McGucken.....	28 N. Y. Civ. Pro. 115.
14	Pittsfield Nat'l Bank v. Tailer.....	28 N. Y. Civ. Pro. 48.
14	Boone v. McGucken.....	28 N. Y. Civ. Pro. 115.
14	Cunningham v. Hatch.....	28 N. Y. Civ. Pro. 82.
14	Martin Canteen Co. v. Warshauer.....	28 N. Y. Civ. Pro. 379.
14	Boone v. McGucken.....	67 Hun, 251.
14,	sub. 8 Cunningham v. Hatch.....	3 Misc. 101.
25	<i>In re</i> Mayor, etc., of N. Y.....	189 N. Y. 140.
26	<i>In re</i> Mayor, etc., of N. Y.....	189 N. Y. 140.
52	<i>In re</i> Mayor, etc., of N. Y.....	189 N. Y. 140.
66	Avery v. Avery.....	28 N. Y. Civ. Pro. 304.
66	Muller v. Mayor.....	28 N. Y. Civ. Pro. 261.
66	Griggs v. McNulty.....	5 Misc. 384.
190	Wheeler v. Sweet	187 N. Y. 435.
190	Moulton v. Cornish.....	188 N. Y. 183.
190	De Lancey v. Piepgras.....	141 N. Y. 88.
190,	sub. 8 <i>In re</i> Callahan	189 N. Y. 51.
236	<i>In re</i> Mayor, etc., of N. Y.....	189 N. Y. 140.
263,	sub. 2 Wilson M'fg Co. v. Schwind.....	5 Misc. 205.
263,	sub. 7 Flynn v. Central Railway Co, N. J.....	28 N. Y. Civ. Pro. 106.
263,	sub. 8 Gridley v. College St. Francis Xavier.....	187 N. Y. 327.
273	People v. Laurence.....	187 N. Y. 517.
275	People v. Laurence.....	187 N. Y. 517.
284	People v. Laurence.....	187 N. Y. 517.

339	<i>Peters v. Peters</i>	8 Misc, 264.
334	<i>Butler v. Manhattan R. R. Co.</i>	8 Misc, 453.
340	<i>Peck v. Dickey</i>	23 N. Y. Civ. Pro. 210.
342	<i>People v. Laurence</i>	187 N. Y. 517.
368	<i>De Dancey v. Piepgras</i>	188 N. Y. 26.
370	<i>Northport Real Estate Co. v. Hendrickson</i>	139 N. Y. 440.
372	<i>Colburn v. Marsh</i>	68 Hun, 269.
380	<i>Piet v. Willson</i>	184 N. Y. 139.
380	<i>Weaver v. Haviland</i>	68 Hun, 876.
382	<i>Jorgensen v. Minister, Elders and Deacons of Reformed Low Church of Harlem, etc.</i>	23 N. Y. Civ. Pro. 232.
382	<i>Piet v. Willson</i>	184 N. Y. 139.
382	<i>Weaver v. Haviland</i>	68 Hun, 876.
382, sub. 7	<i>Anderson v. Porter</i>	23 N. Y. Civ. Pro. 297.
388	<i>Jorgensen v. Minister, Elders and Deacons of Reformed Low Church of Harlem, etc.</i>	23 N. Y. Civ. Pro. 232.
385	<i>Compton v. Bowne</i>	23 N. Y. Civ. Pro. 225.
386	<i>Compton v. Bowne</i>	23 N. Y. Civ. Pro. 225.
386	<i>Adams v. Olin</i>	140 N. Y. 150.
388	<i>Adams v. Fassett</i>	73 Hun, 430.
388	<i>Zweigle v. Hohman</i>	75 Hun, 877.
395	<i>Heaton v. Leonard</i>	69 Hun, 423.
399	<i>Riley v. Riley</i>	141 N. Y. 409.
401	<i>Hayden v. Pierce</i>	71 Hun, 598.
401	<i>Hart v. Kip</i>	74 Hun, 412.
408	<i>Hall v. Brennan</i>	140 N. Y. 409.
408	<i>Riley v. Riley</i>	141 N. Y. 409.
414	<i>Cleveland v. Johnson</i>	5 Misc, 484.
416	<i>Bailey v. Sargent Granite Co.</i>	23 N. Y. Civ. Pro. 319.
424	<i>Fox v. Brooks</i>	23 N. Y. Civ. Pro. 345.
425	<i>Martin v. Raffin</i>	23 N. Y. Civ. Pro. 59.
426	<i>Martin v. Raffin</i>	23 N. Y. Civ. Pro. 59.
431	<i>Barrett v. Am. Telephone Co.</i>	188 N. Y. 491.
431, subd. 8	<i>Brayton v. N. Y., L. E. & W. R. R. Co</i>	72 Hun, 602.
432	<i>Taylor v. Granite S. P. Asso'n</i>	186 N. Y. 843.
432	<i>Miller v. Jones</i>	67 Hun, 281.
432, sub. 2	<i>Foster v. Moore</i>	68 Hun, 526.
434	<i>Farmer v. Natl. Life Ass'n</i>	188 N. Y. 265.
435	<i>Continental Natl. Bank v. Thurber</i>	74 Hun, 632.
436	<i>Fiak v. Bennett</i>	69 Hun, 872.
438	<i>Hatfield v. Malcolm</i>	23 N. Y. Civ. Pro. 197.
438	<i>Miller v. Jones</i>	67 Hun, 281.
439	<i>Hatfield v. Malcolm</i>	23 N. Y. Civ. Pro. 197.

- 449 Coffin v. Prest., etc., of Grand Rapids
Hydraulic Co. 186 N. Y., 655.
- 449 Lord v. Lord. 68 Hun, 537.
- 449 Keer v. Union Mut. Life Ins. Co. 69 Hun, 398.
- 450 Qulity v. Battle. 135 N. Y. 201.
- 450 Weld v. N. Y., L. E. & W. R. R. Co. 68 Hun, 249.
- 453 Smith v. Reid. 184 N. Y. 568.
- 454 Douglass v. Ferris. 138 N. Y. 192.
- 458 Shopiro v. Burns. 23 N. Y. Civ. Pro. 365.
- 459 Shopiro v. Burns. 23 N. Y. Civ. Pro. 365.
- 462 Shopiro v. Burns. 23 N. Y. Civ. Pro. 365.
- 473 Smith v. Reid. 184 N. Y. 568.
- 481 Arrow Steamship Co. v. Bennett. ... 23 N. Y. Civ. Pro. 234.
- 484 Adams v. Stevens. 23 N. Y. Civ. Pro. 356.
- 484 Lamming v. Galusha. 135 N. Y. 239.
- 484 Galusha v. Galusha. 138 N. Y. 272.
- 484 Jackson v. Brown. 74 Hun, 25.
- 488 Coffin v. Prest., etc., of Grand Rapids
Hydraulic Co. 186 N. Y. 655.
- 488 Crane v. Powell. 139 N. Y. 379.
- 494 Newton v. Lee. 139 N. Y. 332.
- 497 Lewis v. Empire State Ins. Co. 23 N. Y. Civ. Pro. 295.
- 498 Coffin v. Prest., etc., of Grand Rapids
Hydraulic Co. 186 N. Y. 655.
- 498 Moss v. Witteman. 4 Misc. 81.
- 499 Moss v. Witteman. 4 Misc. 81.
- 499 Coffin v. Prest., etc., of Grand Rapids
Hydraulic Co. 186 N. Y. 655.
- 499 Weeks v. O'Brien. 141 N. Y. 199.
- 500 Schwartz v. Wechler. 23 N. Y. Civ. Pro. 21.
- 500 Dinan v. Coneys. 23 N. Y. Civ. Pro. 157.
- 501 Dinan v. Coneys. 23 N. Y. Civ. Pro. 157.
- 501 Sheehan v. Pierce. 70 Hun, 22.
- 502, subd. 3 W. S. Trust Co., v. Stanton. 139 N. Y., 581.
- 508 Petrakion v. Arbelly. 23 N. Y. Civ. Pro. 183.
- 508 Howd v. Cole. 74 Hun, 121.
- 511 Wait v. Kaldenberg Co. 68 Hun, 528.
- 511 Meise v. Doscher. 68 Hun, 557.
- 514 Farrell v. Amberg. 23 N. Y. Civ. Pro. 434.
- 516 Steinway v. Steinway. 68 Hun, 430.
- 519 Farrell v. Amberg. 23 N. Y. Civ. Pro. 434.
- 523 Farrell v. Amberg. 23 N. Y. Civ. Pro. 434.
- 523 Farrell v. Hill. 69 Hun, 455.
- 523 Dehn v. Mandeville. 68 Hun, 335.
- 531 Duval Watch Case M'fg Co. v. Key-
stone Watch Case Co. 23 N. Y. Civ. Pro. 44.
- 531 Arrow Steamship Co. v. Bennett. 23 N. Y. Civ. Pro. 234.

531	Bartow v. Sidway.....	72 Hun, 485.
533	Zivi v. Nelke.....	23 N. Y. Civ. Pro. 56.
538	Brassington v. Rohrs.....	23 N. Y. Civ. Pro. 146.
539	Hecla Powder Co. v. Hudson River Co.....	23 N. Y. Civ. Pro. 341.
539	Biershenk v. Stokes.....	23 N. Y. Civ. Pro. 375.
539	Brady v. Nally.....	23 N. Y. Civ. Pro. 384.
539	Merrick v. Hill.....	23 N. Y. Civ. Pro. 413.
540	Hecla Powder Co. v. Hudson River Co.....	23 N. Y. Civ. Pro. 341.
540	Biershenk v. Stokes.....	23 N. Y. Civ. Pro. 375.
540	Merrick v. Hill.....	23 N. Y. Civ. Pro. 413.
542	Brassington v. Rohrs.....	23 N. Y. Civ. Pro. 146.
542	Mussinam v. Hattan.....	23 N. Y. Civ. Pro. 400.
544	Blanc v. Blanc.....	23 N. Y. Civ. Pro. 101.
544	Myers v. Rosenback.....	23 N. Y. Civ. Pro. 363.
544	McAndrew v. Lake Shore & Mis. R. R. Co.....	70 Hun, 23.
544	Patterson v. Hare.....	74 Hun, 269.
545	People ex rel. Allen v. Murray.....	23 N. Y. Civ. Pro. 53.
549,	subd. 2 Rochester Distilling Co. v. O'Brien.....	72 Hun, 463.
552	Leach v. Linde.....	73 Hun, 246.
559	Squire v. McDonald.....	23 N. Y. Civ. Pro. 150.
559	Lafrentz v. Mass.....	23 N. Y. Civ. Pro. 238.
559	Sutorius v. North.....	1 Misc. 298.
559	Keck v. Gross.....	6 Misc. 433.
572	Redner v. Jewett.....	72 Hun, 598.
603	People ex rel. v. Van Buren.....	136 N. Y. 252.
604	People ex rel. v. Van Buren.....	136 N. Y. 252.
608	People ex rel. v. Van Buren.....	136 N. Y. 252.
620	Manufacturers, etc., Bank v. C. W. F. Dare Co.....	67 Hun. 44.
623	Granger v. Smith.....	70 Hun, 9.
636	Garson v. Brumberg.....	23 N. Y. Civ. Pro. 306.
636	Hanover Nat'l Bank v. Stebbins.....	69 Hun, 308.
638	et seq. Seizer v. Potter Produce Co.....	23 N. Y. Civ. Pro. 348.
641	Garson v. Bromberg.....	23 N. Y. Civ. Pro. 306.
649	Calberg v. Emerson.....	23 N. Y. Civ. Pro. 387.
653	Haas v. Swick.....	23 N. Y. Civ. Pro. 397.
655	Capital City Bank v. Parent.....	134 N. Y. 527.
682	Strauss v. Vogt.....	23 N. Y. Civ. Pro. 251.
684	People v. Laurence.....	137 N. Y. 517.
714	Forster v. Moore.....	73 Hun, 244.
721	People ex rel. v. Hasbrouck.....	135 N. Y. 523.
721	McLaughlin v. Webster.....	141 N. Y. 76.
721	De Lancey v. Piepgras.....	73 Hun, 607.

723	People <i>ex rel.</i> v. Hasbrouck.....	185 N. Y. 522.
723	McLaughlin v. Webster.....	141 N. Y. 76.
723	Union Trust Co. v. Schliep.....	28 N. Y. Civ. Pro. 264.
723	Hecla Powder Co. v. Hudson River Co	28 N. Y. Civ. Pro. 341.
723	People <i>ex rel.</i> v. Hasbrouck.....	185 N. Y. 522.
723	Nichols v. Scranton Steel Co.....	187 N. Y. 471.
723	McLaughlin v. Webster.....	141 N. Y. 76.
723	Etting v. Dayton.....	67 Hun, 425.
723	De Lancey v. Piepgras.....	78 Hun, 606.
723	Matters v. Whallon.....	74 Hun, 372.
723	<i>et seq.</i> Rauth v. N. Y. Elevated R. R. Co.....	28 N. Y. Civ. Pro. 95.
724	Manhattan R'y Co. v. Stroub.....	68 Hun, 90.
730	Clark v. Hooper.....	69 Hun, 445.
734	McKeon v. Kellard.....	6 Misc, 81.
738	Lindsley v. Van Cortlandt.....	67 Hun, 145.
738	Hibbard v. Randolph.....	72 Hun, 636.
756	Hegewisch v. Silver.....	140 N. Y. 414.
756	Stout v. Betts	74 Hun, 266.
757	Collins v. Jewell.....	28 N. Y. Civ. Pro. 153.
757	Higgins v. Mayor, etc.....	136 N. Y. 214.
763	Peetsch v. Quinn.....	6 Misc, 50.
766	Hegewisch v. Silver.....	140 N. Y. 414.
768	People <i>ex rel.</i> v. Donovan.....	185 N. Y. 76.
770	People <i>ex rel.</i> Lower v. Donovan....	28 N. Y. Civ. Pro. 1.
779	Brassington v. Rohrs.....	23 N. Y. Civ. Pro. 146.
783	Carey v. Browne.....	23 N. Y. Civ. Pro. 187.
789	<i>et seq.</i> Weiss v. Morrell.....	23 N. Y. Civ. Pro. 352.
791	Seymour v. Spring Forrest Cem. Ass'n.	133 N. Y. 645.
791,	sub. 10. Nichols v. Scranton Steel Co.	185 N. Y. 634.
803	Bundschu v. Simon.....	23 N. Y. Civ. Pro. 80.
803	Hart v. Ogdensburg & L. C. R. R. Co.	69 Hun, 497.
812	Clark v. Hooper.....	69 Hun, 445.
814	Bulkley v. Moses.....	23 N. Y. Civ. Pro. 28.
819	Hiscox v. N. Y. Staats Zeitung and Another.....	23 N. Y. Civ. Pro. 87.
820	Schell v. Lowe.....	23 N. Y. Civ. Pro. 300.
820	Mars v. Albany Savings Bank.....	69 Hun, 398.
820	Taylor v. Satterthwaite.....	2 Misc. 441.
829	Arhart v. Stark.....	6 Misc. 579.
829	Korminsky v. Korminsky.....	2 Misc. 138.
829	Howe & Hummel v. Schweinberg....	4 Misc. 73.
829	Matter of Beach's Estate.....	1 Misc. 27.
829	Hay v. Muller.....	23 N. Y. Civ. Pro. 331.
829	O'Brien v. Weller.....	140 N. Y. 281.
829	McLaughlin v. Webster.....	141 N. Y. 76.

839	<i>Lyon v. Ricker</i>	141 N. Y. 235.
839	<i>In re Bernsee</i>	141 N. Y. 839.
839	<i>Matter of Bedlow</i>	67 Hun, 408.
839	<i>Eighmie v. Taylor</i>	68 Hun, 573.
829	<i>Cunningham v. Whitford</i>	74 Hun, 273.
831	<i>Woodrick v. Woodrick</i>	141 N. Y. 457.
831	<i>Huntley v. Huntley</i>	73 Hun, 261.
832	<i>People ex rel. Stewart v. Paschal</i>	68 Hun, 344.
834	<i>People v. Harris</i>	136 N. Y. 423.
834	<i>People v. Diney</i>	137 N. Y. 570.
834	<i>Matter of Lowenstine's Will</i>	2 Misc. 323.
835	<i>Collins v. Robinson</i>	73 Hun, 495.
836	<i>Matter of Lowenstine's Will</i>	2 Misc. 323.
836	<i>Collins v. Robinson</i>	73 Hun, 495.
837	<i>Dehn v. Manderville</i>	68 Hun, 335.
870	<i>Simmons v. Hazard</i>	23 N. Y. Civ. Pro. 15.
870	<i>Wahl v. McMillan</i>	2 Misc. 343.
770	<i>et seq. Kelly v. N. Y. Central & Hud-</i> <i>son River R. R. Co.</i>	23 N. Y. Civ. Pro. 67.
870	<i>et seq. Watts v. Wilcox</i>	23 N. Y. Civ. Pro. 69.
870	<i>et seq. Horton v. Barnes</i>	23 N. Y. Civ. Pro. 195.
872	<i>Depierris v. Slaven</i>	74 Hun, 628.
873	<i>Clark v. Wilcklow</i>	75 Hun, 290.
873	<i>Wahl v. McMillan</i>	2 Misc. 343.
873	<i>et seq. Simmons v. Hazard</i>	23 N. Y. Civ. Pro. 15.
893	<i>Adams v. Fassett</i>	78 Hun, 430.
887	<i>Hemmenway v. Knudson</i>	78 Hun, 227.
891	<i>Krauss v. Hallbeimer</i>	23 N. Y. Civ. Pro. 317.
893	<i>Becker v. Town of Cherry Creek</i>	70 Hun, 6.
893	<i>Laidley v. Rogers</i>	23 N. Y. Civ. Pro. 110.
893	<i>et seq. Fry v. Manhattan R. R. Co.</i> ..	23 N. Y. Civ. Pro. 98.
894	<i>Laidley v. Rogers</i>	23 N. Y. Civ. Pro. 110.
910	<i>Benedict v. Richardson</i>	68 Hun, 202.
936	<i>Mutual Life Ins. Co. v. Corey</i>	135 N. Y. 326.
953	<i>Dunstan v. Higgins</i>	133 N. Y. 70.
956	<i>Jacobi v. Order of Germania</i>	73 Hun, 602.
957	<i>Dunstan v. Higgins</i>	133 N. Y. 70.
963	<i>Jacobi v. Order of Germania</i>	73 Hun, 602.
970	<i>Bradley & Currier Co. v. Herter</i>	23 N. Y. Civ. Pro. 408.
974	<i>Bradley & Currier Co. v. Herter</i>	23 N. Y. Civ. Pro. 408.
977	<i>Weiss v. Morrell</i>	23 N. Y. Civ. Pro. 353.
982	<i>Mahoney v. Mahoney</i>	70 Hun, 78.
983	<i>Galligan v. Hornthal</i>	23 N. Y. Civ. Pro. 301.
984	<i>Shepherd v. Squire</i>	23 N. Y. Civ. Pro. 405.
986	<i>Shepherd v. Squire</i>	23 N. Y. Civ. Pro. 404.
993	<i>McIntyre v. Tucker</i>	23 N. Y. Civ. Pro. 171.
993	<i>McIntyre v. Tucker</i>	23 N. Y. Civ. Pro. 171.

- 997 *Woodhull v. Mayor, etc.*.....69 Hun, 210.
 998 *Smith v. Ingham University*, ...23 N. Y. Civ. Pro. 893.
 999 *Hegewisch v. Silver*.... 23 N. Y. Civ. Pro. 41.
 999 *Ferguson v. Gill*.....74 Hun, 566.
 1001 *Knolton v. Atkins*.....134 N. Y. 313.
 1001 *Fischer v. Blank*..... 138 N. Y. 669.
 1001 *Garazynski v. Russell* 75 Hun, 512.
 1002 *Leonard v. Germania Fire Ins. Co.*...23 N. Y. Civ. Pro. 155.
 1003 *Haskell v. Northern Adirondack R.*
R. Co......74 Hun, 880.
 1009 *Dalton v. Vanderveer*.....23 N. Y. Civ. Pro. 443.
 1010 *Hecla Consolidated Gold Mining Co.*
v. O'Neill.....23 N. Y. Civ. Pro. 143.
 1010 *Garland v. Van Rensselaer* 23 N. Y. Civ. Pro. 208.
 1018 *Spence v. Simis*.....137 N. Y. 616.
 1018 *Johnstown v. Atlantic Avenue R. R.*
Co. 139 N. Y. 449.
 1013 *Fitch v. Volker & Falthousen M'fg.*
Co......70 Hun, 71.
 1018 *Deeves v. Metropolitan, &c., Co.*....6 Misc. 91.
 1015 *Doyle v. Metropolitan El. R. R. Co.*...136 N. Y. 505.
 1015 *Wamsley v. Horton & Co.*.....68 Hun, 549.
 1021 *Garland v. Van Rensselaer*.....23 N. Y. Civ. Pro. 208.
 1021 *Roome v. Jennings*.....3 Misc. 413.
 1022 *Gold v. Serrell*... 2 Misc. 224.
 1023 *Roome v. Jennings*.....3 Misc. 413.
 1204 *Van Allen v. Rogers*.....5 Misc. 423.
 1210 *Matter of Miller*.....70 Hun, 61.
 1229 *Smith v. Smith*.....23 N. Y. Civ. Pro. 884.
 1237 *Arrow Steamship Co. v. Bennett*...23 N. Y. Civ. Pro. 234.
 1237 *Matter of Miller*... 70 Hun, 61.
 1241 *Pittsfield National Bank v. Tailer*...23 N. Y. Civ. Pro. 48.
 1241 *Cunningham v. Hatch*.....23 N. Y. Civ. Pro. 82.
 1241 sub. 4 *Gildersleeve v. Lester*.....68 Hun, 535.
 1251 *Matter of Hazard*.....73 Hun, 22.
 1252 *Garazynski v. Russell*.....75 Hun, 497.
 1274 *Weil v. Hill*.... 71 Hun, 133.
 1279 *Kneller v. Tang*.....137 N. Y. 589.
 1282 *In re Flynn*.....136 N. Y. 287.
 1282-1293 *Nat'l Broadway Bank v. Hitch*..23 N. Y. Civ. Pro. 10.
 1290 *In re Flynn*.....136 N. Y. 287.
 1294 *Zivi v. Nelke* 23 N. Y. Civ. Pro. 56.
 1294 *Keller v. Feldman*.....23 N. Y. Civ. Pro. 37.
 1294 *Biershenk v. Stokes*.....23 N. Y. Civ. Pro. 375.
 1310 *Durant Land Improvement Co. v.*
Thompson-Houston Electric Co....23 N. Y. Civ. Pro. 29.
 1314 *People ex rel. Standard Gas Co. v.*
Daly.....75 Hun, 166.

1816	<i>In re Whitmore v. Village of Tarry-</i> town.....	187 N. Y. 410.
1837	<i>Schaefer v. Jones</i>	1 Misc. 74.
1837	<i>Pittsfield Natl. Bank v. Tailer</i>	28 N. Y. Civ. Pro. 48.
1841	<i>Carling v. Percell</i>	28 N. Y. Civ. Pro. 140.
1846, 1847, 1848, 1849, }	<i>Garezynski v. Russell</i>	75 Hun, 512.
1849	<i>Bullion v. Bullion</i>	73 Hun, 487.
1858	<i>Bonneford v. De Russey</i>	73 Hun, 377.
1856	<i>Matter of Broadway and 7th Ave. R.</i> R. Co.....	69 Hun, 275.
1866	<i>et seq. Piepgras v. Edmunds</i>	28 N. Y. Civ. Pro. 241.
1869	<i>Garezynski v. Russell</i>	75 Hun, 497.
1877	sub. 2 <i>Anderson v. Porter</i>	28 N. Y. Civ. Pro. 297.
1880	<i>Matter of Phelps</i>	6 Misc. 8971.
1898	<i>Countryman v. Countryman</i>	28 N. Y. Civ. Pro. 161.
1404	<i>Countryman v. Countryman</i>	28 N. Y. Civ. Pro. 161.
1421	<i>Fleig v. Gorman</i>	1 Misc. 194.
1484	<i>Baldwin v. Baldwin</i>	28 N. Y. Civ. Pro. 287 note
1502	<i>Sanders v. Parshall</i>	67 Hun, 105.
1525	<i>Compton v. The Chelsea</i>	189 N. Y. 538.
1525	<i>De Lancey v. Piepgras</i>	141 N. Y. 88.
1526	<i>Purdy v. Bennett</i>	68 Hun, 227.
1531	<i>Chase v. Lamphere</i>	67 Hun, 599.
1533	<i>Baldwin v. Baldwin</i>	28 N. Y. Civ. Pro. 268.
1532	<i>Weston v. Stoddard</i>	187 N. Y. 119.
1537	<i>Weston v. Stoddard</i>	187 N. Y. 119.
1543	<i>Weston v. Stoddard</i>	187 N. Y. 119.
1581	<i>Flynn v. Lynch</i>	28 N. Y. Civ. Pro. 369.
1617	<i>Robinson v. Govers</i>	188 N. Y. 425.
1626	<i>et seq. Hatfield v. Malcolm</i>	28 N. Y. Civ. Pro. 197.
1630	<i>Guilford v. Crandall</i>	69 Hun, 414.
1638	<i>Kings v. Townshend</i>	28 N. Y. Civ. Pro. 326.
1638	<i>Kent v. Church St. Michael</i>	186 N. Y. 10.
1639	<i>Kings v. Townshend</i>	28 N. Y. Civ. Pro. 326.
1650	<i>Kent v. Church St. Michael</i>	186 N. Y. 10.
1667	<i>McCruden v. Rochester Railway Co.</i> ..	5 Misc. 59.
1668	<i>McCruden v. Rochester Railway Co.</i> ..	5 Misc. 59.
1669	<i>Compton v. The Chelsea</i>	189 N. Y. 538.
1670	<i>Haeley v. Ano</i>	186 N. Y. 569.
1690	<i>Klee v. Grant as Sheriff</i>	4 Misc. 88.
1690	sub. 3 <i>Wise v. Grant</i>	140 N. Y. 593.
1709	<i>King Co. v. Seed</i>	6 Misc. 4.
1726	<i>Hay v. Muller</i>	28 N. Y. Civ. Pro. 321.
1780	<i>Hay v. Muller</i>	28 N. Y. Civ. Pro. 321.
1781	<i>Columbus Watch Co. v. Hodenpyl</i>	135 N. Y. 430.
1743	<i>Jones v. Jones</i>	71 Hun, 519.
1743	sub. 4 <i>Keyes v. Keyes</i>	6 Misc. 355.

1758	Griffin v. Griffin.....	70 Hun, 73.
1762	Gilbert v. Gilbert.....	5 Misc. 555.
1769	McCarthy v. McCarthy.....	187 N. Y. 500.
1769	Mercer v. Mercer.....	73 Hun, 192.
1770	Blank v. Blanc.....	23 N. Y. Civ. Pro. 101.
1775	Fraser v. Granite State Provident Association.....	23 N. Y. Civ. Pro. 390.
1771	Martin Canteen Co. v. Warshauer....	23 N. Y. Civ. Pro. 379.
1776	McElvee M'f'g. Co. v. Trowbridge....	68 Hun, 28.
1776	Matter of Broadway v. 7th Av. R.R. Co.	73 Hun, 7.
1780	Flynn v. Central Railway Co. of N.J....	23 N. Y. Civ. Pro. 106.
1780	Seizer v. Potter Produce Co.	23 N. Y. Civ. Pro. 343.
1780	Perry v. Erie Transfer Co.	1 Misc. 208.
1781	People v. Ballard.....	134 N. Y. 269.
1781	Gildersleeve v. Lester.....	68 Hun, 535.
1782	People v. Ballard.....	134 N. Y. 269.
1782	Gildersleeve v. Lester.....	68 Hun, 535.
1784	Hunting v. Blun.....	69 Hun, 562.
1788	Rich v. Sargent Granite Co.	23 N. Y. Civ. Pro. 359.
1810	Logan v. McCall Publishing Co.....	23 N. Y. Civ. Pro. 246.
1812	Logan v. McCall Publishing Co.....	23 N. Y. Civ. Pro. 246.
1815	Murphy v. Naughton.....	68 Hun, 424.
1822	Wintermeyer v. Sherwood.....	23 N. Y. Civ. Pro. 422.
1822	Hayden v. Pierce.....	71 Hun, 593.
1822	Peters v. Stewart.....	1 Misc. 8.
1825	Columbus Watch Co. v. Hodenpyl....	135 N. Y. 430.
1826	Columbus Watch Co. v. Hodenpyl....	135 N. Y. 430.
1835	Matson v. Abbey.....	141 N. Y. 179.
1836	Matson v. Abbey.....	141 N. Y. 179.
1836	Sheldon v. Merrick.....	70 Hun, 41.
1843	Adams v. Fassett.....	73 Hun, 430.
1844	Adams v. Fassett.....	73 Hun, 430.
1848	Read v. Patterson.....	134 N. Y. 128.
1848	Adams v. Tassett.....	73 Hun, 430.
1861	Clark v. Poor.....	73 Hun, 143.
1865	Mellen v. Mellen.....	139 N. Y. 210.
1866	Mellen v. Mellen.....	139 N. Y. 210.
1871	Weaver v. Haviland.....	68 Hun, 376.
1872	Weaver v. Haviland.....	68 Hun, 376.
1902	Lang v. Houston St. &c. R. R. Co ..	75 Hun, 151.
1906	Hemmens v. Nelson.....	133 N. Y. 517.
1917	Read v. Marine Bank.....	136 N. Y. 454.
1919	Schwartz v. Wechler.....	23 N. Y. Civ. Pro. 21.
1923,	<i>et seq.</i> , Schwartz v. Wechler.....	23 N. Y. Civ. Pro. 21.
1934	Crane v. Cranitch.....	3 Misc. 557.
1942	Harbeck v. Pupin.....	73 Hun, 1.
1948	People v. Equity Gas Light Co.....	141 N. Y. 282.
1948	People v. Equity Gas Light Co.....	3 Misc. 833.

- 1977 *Croner v. Cowdrey*.....189 N. Y. 471.
 1991 *People ex rel. v. Goldfogle*.....28 N. Y. Civ. Pro. 417.
 1997 *People ex rel. v. Harbrouck*.....185 N. Y. 522.
 2067 *In re Torney v. Stinar*.....28 N. Y. Civ. Pro. 838.
 2067, *et seq.* *People ex rel. Allen v. Murray*.....28 N. Y. Civ. Pro. 71.
 2068 *People ex rel. Lower v. Donovan*....28 N. Y. Civ. Pro. 1.
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 2070 *People ex rel. v. Hasbrouck*.....185 N. Y. 522.
 2086 *People ex rel. Bates v. Speed*.....78 Hun, 802.
 2091, *et seq.* *People ex rel. v. Goldfogle*...28 N. Y. Civ. Pro. 417.
 2127 *In re Corwin*.....185 N. Y. 245.
 2203, *et seq.* *In re Wm. L. Patton*.....28 N. Y. Civ. Pro. 831.
 2206 *In re Wm. L. Patton*.....28 N. Y. Civ. Pro. 831.
 2231 *Barry v. Smith*.....1 Misc. 240.
 2231, *et seq.* *Durant Land Improvement*
 Co. v. Thompson-Houston Electric
 Co......28 N. Y. Civ. Pro. 29.
 2231, *et seq.* *People ex rel. v. Goldfogle*...28 N. Y. Civ. Pro. 417.
 2232 *Barry v. Smith* 69 Hun, 88.
 2233 *Compton v. The Chelsea*.....189 N. Y. 538.
 2435 *Cleveland v. Johnson* 5 Misc. 484.
 2236 *Compton v. The Chelsea*.....189 N. Y. 538.
 2244 *Rogers v. Earle*.....28 N. Y. Civ. Pro. 220.
 2245 *Towman v. Sprague*.....78 Hun, 408.
 2248 *People ex rel. Allen v. Murray*.....28 N. Y. Civ. Pro. 71.
 2249 *People ex rel. Allen v. Murray*.....28 N. Y. Civ. Pro. 71.
 2251 *People ex rel. Allen v. Murray*.....28 N. Y. Civ. Pro. 71.
 2263 *Durant Land Improvement Co. v.*
 Thompson-Houston Electric Co....28 N. Y. Civ. Pro. 29.
 2266 *et seq.* *Pittsfield Nat'l Bank v. Tailer*.....28 N. Y. Civ. Pro. 48.
 2266 *Boone v. McGucken*.....28 N. Y. Civ. Pro. 115.
 2281 *Boone v. McGucken*.....28 N. Y. Civ. Pro. 115.
 2281 *Martin Canteen Co. v. Warshauer*...28 N. Y. Civ. Pro. 879.
 2284 *Martin Canteen Co. v. Warshauer*...28 N. Y. Civ. Pro. 879.
 2345 *Kent v. Church St. Michael*.....186 N. Y. 10.
 2351 *Flynn v. Lynch*.....28 N. Y. Civ. Pro. 269.
 2358 *Stevens v. Page*.....28 N. Y. Civ. Pro. 191.
 2359 *Ford v. Livingston*.....140 N. Y. 162.
 2359 *Walrath v. Abbott*.....75 Hun, 445.
 2365 *Flannery v. Sahagian*.....184 N. Y. 85.
 2366 *Herbst v. Hagenaers* 137 N. Y. 290.
 2369 *Flannery v. Sahagian*.....184 N. Y. 85.
 2372 *Flannery v. Sahagian*.....184 N. Y. 85.
 2372 *Matter of Beach v. Sterne*.....67 Hun, 844.
 2372 *Matter of Greening*.....74 Hun, 62.
 2374 *Herbst v. Hagenaers*.....137 N. Y. 290.
 2432 *Barnes v. Levy* 28 N. Y. Civ. Pro. 253.
 2432, sub. 1. *Palen v. Bushnell*.....68 Hun, 554.

2435	Logan v. McCall Publishing Co.....	140 N. Y. 447.
2435	<i>et seq.</i> Logan v. McCall Publishing Co.....	23 N. Y. Civ. Pro. 246.
2447	Serven v. Lowerre.....	8 Misc. 113.
2452	Logan v. McCall Publishing Co.....	140 N. Y. 447.
2455	Serven v. Lowerre.....	8 Misc. 113.
2458	Bachelor v. Nugent.....	23 N. Y. Civ. Pro. 178.
2458	Logan v. McCall Publishing Co.....	140 N. Y. 447.
2463	Stephens v. Page.....	23 N. Y. Civ. Pro. 191.
2463	Logan v. McCall Publishing Co.....	23 N. Y. Civ. Pro. 246.
2465	Darrow v. Riley.....	5 Misc. 863.
2472	<i>In re</i> Cornell.....	137 N. Y. 600.
2478	Bolton v. Schriver.....	135 N. Y. 65.
2481	<i>In re</i> Flynn.....	136 N. Y. 287.
2481	Matter of Harlow.....	73 Hun, 433.
2481,	sub. 6. Matter of Soule.....	73 Hun, 594.
2517	Matter of Will of Bradley.....	70 Hun, 104.
2534	Burns v. D. L. & W. R. R. Co.....	135 N. Y. 263.
2538	<i>In re</i> Plumb.....	135 N. Y. 661.
2576	<i>In re</i> Steward.....	135 N. Y. 413.
2576	Matter of Walrath.....	69 Hun, 403.
2576	Stout v. Betts.....	74 Hun, 266.
2583	Stout v. Betts.....	74 Hun, 266.
2588	Matter of Gaines.....	74 Hun, 94.
2606	Potter v. Ogden.....	136 N. Y. 384.
2610	Potter v. Ogden.....	136 N. Y. 384.
2620	Matter of Kletts' will.....	8 Misc. 285.
2620	Matter of Clark.....	75 Hun, 471.
2622	<i>In re</i> Bartholick.....	141 N. Y. 166.
2624	<i>In re</i> Walker.....	136 N. Y. 20.
2624	Matter of Perkins.....	75 Hun, 129.
2625	<i>In re</i> Walker.....	136 N. Y. 20.
2626	<i>In re</i> Walker.....	136 N. Y. 20.
2627	<i>In re</i> Merriam.....	136 N. Y. 58.
2647	Matter of Will of Bradley.....	70 Hun, 104.
2653a	Hawke v. Hawke.....	74 Hun, 370.
2660	Knox v. Nobel.....	23 N. Y. Civ. Pro. 311, 429.
2685	Estate of Wood.....	70 Hun, 230.
2686	Matter of O'Brien.....	5 Misc. 136.
2687	Matter of O'Brien.....	5 Misc. 136.
2700	Smith v. Second Nat'l Bank.....	70 Hun, 357.
2701	Smith v. Second Nat'l Bank.....	70 Hun, 357.
2702	Lang v. Houston St., &c. R. R. Co.....	75 Hun, 151.
2717	Matter of Miller.....	70 Hun, 61.
2718	Matter of Miller.....	70 Hun, 61.
2734	Estate of Munzor.....	4 Misc. 374.
2736	Naylor v. Gale.....	73 Hun, 53.
2739	O'Flynn v. Powers.....	136 N. Y. 412.
2740	O'Flynn v. Powers.....	136 N. Y. 412.

2749	Estate of Wm. C. Bell.....	23 N. Y. Civ. Pro. 128.
2749	<i>In re Gautert</i>	186 N. Y. 106.
2749	Matter of Heroy.....	67 Hun, 18.
2750	<i>O'Flynn v. Powers</i>	136 N. Y. 412.
2750	Matter of Callaghan.....	69 Hun, 161.
2752,	sub. 4. Matter of Williams' Estate....	1 Misc. 85.
2755	<i>O'Flynn v. Powers</i>	186 N. Y. 412.
2756	<i>O'Flynn v. Powers</i>	186 N. Y. 412.
2797	Matter of Stillwell	68 Hun, 406.
2798	<i>In re Stillwell</i>	189 N. Y. 838.
2798	Matter of Callaghan.....	69 Hun, 161.
2799	<i>In re Stillwell</i>	189 N. Y. 838.
2801	<i>In re Gautert</i>	186 N. Y. 106.
1817	<i>In re McGillvray</i>	188 N. Y. 808.
2818	Matter of Hecht.....	71 Hun, 62.
2863	<i>Bartlett v. Mugett</i>	23 N. Y. Civ. Pro. 288.
2863,	sub. 4. Walker v. Scott.....	23 N. Y. Civ. Pro. 90.
2916	<i>Kingsford v. Butler</i>	23 N. Y. Civ. Pro. 228.
2918	<i>Kingsford v. Butler</i>	23 N. Y. Civ. Pro. 228.
2925	<i>Clark v. Hooper</i>	69 Hun, 445.
2934	<i>Myers v. Rosenback</i>	23 N. Y. Civ. Pro. 363.
2944	<i>Walker v. Scott</i>	23 N. Y. Civ. Pro. 90.
2944	<i>Myers v. Rosenback</i>	23 N. Y. Civ. Pro. 363.
2944	<i>Dows v. Morrison</i>	3 Misc. 54.
2945-2950	<i>Walker v. Scott</i>	23 N. Y. Civ. Pro. 90.
2950	<i>Bartlett v. Mugett</i>	23 N. Y. Civ. Pro. 288.
2951	<i>People ex rel. v. Goldfogle</i>	23 N. Y. Civ. Pro. 417.
2951	<i>Van Etten v. Van Etten</i>	69 Hun, 499.
2952	<i>People ex rel. Goldfogle</i>	23 N. Y. Civ. Pro. 417.
3017	<i>Anderson v. Porter</i>	23 N. Y. Civ. Pro. 297.
3020	<i>Anderson v. Porter</i>	23 N. Y. Civ. Pro. 297.
3056	<i>McGovern v. Eldridge</i>	1 Misc. 170.
3063	<i>Kingsford v. Butler</i>	23 N. Y. Civ. Pro. 228.
3063	<i>Runge v. Esau</i>	6 Misc. 147.
3064	<i>Young v. Conklin</i>	8 Misc. 122.
3068	<i>Bartlett v. Mugett</i>	23 N. Y. Civ. Pro. 288.
3070	<i>Vogel v. Schlueter</i>	23 N. Y. Civ. Pro. 256.
3070	<i>Sherman v. Shisler</i>	6 Misc. 208.
3072	<i>Vogel v. Schlueter</i>	23 N. Y. Civ. Pro. 256.
3191	sub. 3. Keller v. Feldman.....	23 N. Y. Civ. Pro. 37.
3192	<i>Carling v. Percell</i>	23 N. Y. Civ. Pro. 140.
3198	<i>Biershenk v. Stokes</i>	23 N. Y. Civ. Pro. 375.
3212	<i>Eagan v. Laemmle</i>	5 Misc. 224.
3215	<i>Walker v. Scott</i>	23 N. Y. Civ. Pro. 90.
3228	<i>Hadley v. Pethcal</i>	23 N. Y. Civ. Pro. 216.
3228	<i>Farrell v. Hill</i>	69 Hun, 455.
3229	<i>Tallman v. Bernhard</i>	23 N. Y. Civ. Pro. 284.
3229	<i>Roome v. Jennings</i>	8 Misc. 413.

3232	Brassington v. Rohrs.....	23 N. Y. Civ. Pro. 146.
3232	Tallman v. Bernhard	23 N. Y. Civ. Pro. 284.
3233	Brassington v. Rohrs.....	23 N. Y. Civ. Pro. 146.
3236	Hadley v. Pethcal.....	23 N. Y. Civ. Pro. 216.
3238	<i>et seq.</i> Marx v. Goss.....	23 N. Y. Civ. Pro. 97.
3240	Matter of Lind, Etc., R. Co.....	68 Hun, 252.
3247	Thorn v. Beard	23 N. Y. Civ. Pro. 188.
3251	Ward v. Ward.....	23 N. Y. Civ. Pro. 61.
3251	Cassidy v. McFarland.....	23 N. Y. Civ. Pro. 65.
3251	Cole v. Lowry.....	23 N. Y. Civ. Pro. 113.
3251	Hadley v. Pethcal	23 N. Y. Civ. Pro. 216.
3251	Lewis v. Empire State Ins. Co.....	23 N. Y. Civ. Pro. 295.
3252	O'Flynn v. Powers.....	186 N. Y. 412.
3253	Dode v. Manhattan Railway Co.....	23 N. Y. Civ. Pro. 180.
3253	T. New M'fg Co. v. Galway.....	23 N. Y. Civ. Pro. 239.
3256	Ward v. Ward.....	23 N. Y. Civ. Pro. 61.
3256	Cassidy v. McFarland.....	23 N. Y. Civ. Pro. 65.
3256	Griggs v. Guinn	23 N. Y. Civ. Pro. 46.
3256	Stewart v. Paton	23 N. Y. Civ. Pro. 286.
3256	Whitney v. Roe.....	75 Hun, 508.
3258	People <i>ex rel</i> Bates v. Speed.....	78 Hun, 302.
3262	<i>et seq.</i> Hecla Consolidated Gold Mining Co. v. O'Neill.....	23 N. Y. Civ. Pro. 148.
3264	Hewitt v. City Mills.	186 N. Y. 211.
3268	Lafrentz v. Mass.....	23 N. Y. Civ. Pro. 288.
3271	Montgomery v. Odell.....	78 Hun, 424.
3271	Rutherford v. Town of Madrid.....	5 Misc. 572.
3271	Schmidt v. Eissman.....	6 Misc. 264.
3272	Montgomery v. Odell.....	78 Hun, 424.
3273	Lafrentz v. Mass.....	23 N. Y. Civ. Pro. 288.
3296	Griggs v. Guinn.....	23 N. Y. Civ. Pro. 46.
3296	Griggs v. Day	185 N. Y. 470.
3297	Stewart v. Paton.....	23 N. Y. Civ. Pro. 286.
3301	Bonnefond v. De Russey.....	78 Hun, 377.
3334	Matter of Broadway & 7th Av. R. R. Co.....	69 Hun, 275.
3339	Dalton v. Vanderveer....	23 N. Y. Civ. Pro. 443.
3343	sub. 2. Cunningham v. Hatch.....	23 N. Y. Civ. Pro. 82.
3343	sub. 18. <i>In re</i> Merriam.....	141 N. Y. 479.
3347	Myers v. Rosenback.....	23 N. Y. Civ. Pro. 363.
3347	Nichols v. Scranton Steel Co.....	185 N. Y. 634.
3352	Read v. Patterson.....	184 N. Y. 128.
3357	Matter of B'way & 7th Av. R. R. Co.	78 Hun, 7.
3357	<i>et seq.</i> <i>In re</i> N. Y. & B'klyn Bridge.	137 N. Y. 95.
3361	Matter of B'way & 7th Av. R. R. Co.	69 Hun, 275.
3365	Matter of B'way & 7th Av. R. R. Co.	78 Hun, 7.
3369	Manhattan R'y Co. v. Strout.....	68 Hun, 90.
3375	Manhattan R'y Co. v. Strout.....	70 Hun, 363.

CIVIL PROCEDURE REPORTS.

PEOPLE *ex rel.*, LOWER, RESPONDENT, *v.* DONOVAN, AS
INSPECTOR OF ELECTIONS, ETC., APPELLANT.

COURT OF APPEALS, OCTOBER, 1892.

§§ 8, 770, 2068, 2069.

*Mandamus—cannot be issued in first department or elsewhere by judge
at chambers—Court cannot issue mandamus on election day
—What business may be done by court on day
of general election—Contempt.*

An order made by a court or judge in a proceeding of which the tribunal or officer had no jurisdiction, and which is not merely irregular or erroneous, is not a lawful mandate, and disobedience thereto cannot be punished as a contempt [1].

A judge at chambers has no jurisdiction either in the city of New York or elsewhere within the State to issue a writ of mandamus [12]; the writ can only be issued at special term, except in cases where it is provided by section 2069 of the Code of Civil Procedure that it shall be granted only at general term [9, 10], and the provisions of section 770 of the Code of Civil Procedure declaring that in the first judicial district a motion which elsewhere must be made in court may be made to a judge out of

People v. Donovan.

court, except for a new trial on the merits, does not apply to the issuance of a writ of mandamus, and does not enlarge the power of the judge in the first judicial district so as to enable him to issue a writ of mandamus out of term or when not sitting as a court [5, 8, 11, 12].

The rule at common law [2], in colonial times, under the ordinances of 1699 and 1714 [3], under the Revised Statutes [3], under laws of 1873, chap. 239 [4], and under the Code of Procedure and of Civil Procedure [5-12], as to whom the power to issue a writ of mandamus is vested is stated.

No court can be opened within this State on the day of any general election to transact any business, except for the purpose of receiving a verdict or discharging a jury, and for the exercise by a single magistrate of certain jurisdiction in a criminal case [13].

A voter who is refused the right to vote at a general election can resort to no court for relief until after his right is lost, and no court can entertain his application on election day [14].

People *ex rel.*, Lower, v. Donovan (63 *Hun*, 512; s. c. 45 *St. Rep.*, 141; 18 *N. Y. Supp.* 501) reversed.

(Decided October, 1892.)

Appeal by the defendant from an order of the general term of the supreme court, in the first department, affirming an order of the special term adjudging him guilty of criminal contempt and punishing him by fine and imprisonment.

The facts are stated in the opinion.

Henry Grasse, for defendant, appellant.

No order having been made in this matter by the supreme court, at a special term thereof, the writ was not a lawful mandate of the court; and disobedience of it cannot be punished. (People v. Gilmore, 26 *Hun*, 1.)

The want of an order of the court duly entered, granting the writ of mandamus is a fatal defect, and renders it nugatory; for unless granted at a general term of the supreme court, it can only be granted at a special term of the court. *Code Civ. Pro.* § 2068. The only exception

People v. Donovan.

provided for is, that in the next section 2069, that in certain cases it can only be granted at general term. The provision of § 770 of the Code, has no application to qualify the § 2068, which is relied on. Section 770 is embraced under a "Title" headed and called "*Motions and Orders Generally*." The various provisions of this Title, "*Motions and Orders Generally*," are referred to in the second sentence of § 1997 of the Code, as follows: "The provisions of this act, relating to amendments, motions and intermediate orders, in an action are applicable to similar acts in such a special proceeding; except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of a State writ, or the mode of procedure thereunder." So that whatever there is in § 770, as to the powers of justices out of court in the first district, is nullified, as to writs of mandamus by the special provision otherwise made in § 2068, that they can only be granted at a special term of the court. Among these §§ 1991 to 2014 under "*Article First*," will be found other provisions as in §§ 1998 and 1999, making other qualifications by similar language, as to mandamus and other State writs; *vide Code Civ. Pro.* § 2092 as to prohibition. And it must be further urged that, as the only remedy by appeal is from "*an order granting a peremptory writ 'of mandamus,'*" as provided by § 2087, the entry of a formal order, granting or refusing a writ of mandamus is necessary; and a different practice, as in this case, in the language of § 1997 of the Code "is repugnant to the object of the State writ, or the mode of procedure thereunder," as prescribed by the Code. §§ 2068 and 2087. . . . The writ of mandamus in this case was unlawful because it was issued on a public holiday, i. e., the general election day, the 3d of November, 1891. (Law 1887; chap. 289, § 1.) The decisions of the supreme court, general term in the *People v. Kearney* in 47 *Hun*, 129, and in *People ex rel. Fulton v. Supervisors of Oswego*, 50 *Hun*, 105, in construing this holiday law, stand upon the very

People v. Donovan.

narrowest interpretation of the language of the act of 1887. . . . There is no power in the court or a justice of the supreme court to grant or issue a mandamus on any day on which a general election is held in the State. The statutes of this State provide as follows: "No court shall be opened to transact any business in any city or town on the day such election shall be held therein, unless it be for the purpose of receiving a verdict or discharging a jury but this section shall not prevent the exercise of the jurisdiction of any single magistrate, when it shall be necessary in criminal cases to preserve the peace or to arrest offenders." (Section 5, title 1, chap. 130, laws, 1842, as amended by § 2, chap. 240, laws, 1847. Also vol. 1, *Bird's Rev. Stat.* p. 926. Also vol. 1, *Bank's* (6th ed.) *Rev. Stat.*, p. 427. See also *In re Election Day*, 7 *Hill*, 194. *Redfield v. Florence*, 2 *E. D. Smith*, 340.)

David Leventritt & Charles H. Knox, for relator, respondent.

It has been repeatedly held that a court has power to sit on a holiday. (*People v. Kearney*, 47 *Hun*, 133, 134. *People v. Supervisors*, 50 *Hun*, 105. *Nichols v. Kelsey*, 13 *N. Y. Civ. Pro.* 154. *Fries v. Coar*, 13 *N. Y. Civ. Pro.* 152.) The election law refers only to a "court," and not to the power of a judge. Chap. 130, *Laws of 1842*. Chap. 240, *Laws of 1847*. *Bank's Rev. Stat.* (8th ed.), p. 410. In the first judicial district a motion, which elsewhere must be made in court, may be made to a judge out of court. (*Code Civ. Pro.* § 770.)

ANDREWS J.—On the 3d day of November, 1891, the day of the general election in this State, the Honorable A. B. Lawrence, one of the justices of the supreme court, upon application made to him at his chambers in the City of New York, in behalf of the relator, a duly qualified

People v. Donovan.

elector of the Seventh Election District of the Second Assembly District of that city, made an order requiring the inspectors in that election district to show cause before him at the court house, in said city, at 3 o'clock P. M. of that day, why a writ of peremptory mandamus should not be issued commanding and requiring them to permit the relator to take the disability oath provided in the election law, and upon taking the oath, to permit him to retire with a person of his selection to one of the booths and compartments provided in said election district for the purpose of preparing his ballot, and to accept, receive and deposit the ballot when prepared, &c. The affidavit upon which the application was made set out certain facts which, in the opinion of the learned justice, entitled the relator to this relief. The order to show cause was served on Donovan and the other inspectors within the time limited by the order, but they did not appear on its return, and thereupon due proof of the service of the order having been made, and of other facts, the justice issued a peremptory writ following the order to show cause and commanding the inspectors to do and permit the things therein stated.

The peremptory writ was served on the inspectors before the closing of the polls, and there is evidence tending to show that they refused to obey it. Subsequently, application was made to the court, at special term, to punish the inspectors for contempt in disobeying the writ, and the proceedings resulted in an order adjudging the defendant Donovan guilty of contempt and imposing upon him a fine of \$250 and ten days' imprisonment, as a punishment for his misconduct. The order was affirmed on appeal to the general term, and the present appeal is from the order of affirmance.

The order made by the special term is challenged on the ground that Mr. Justice Lawrence, sitting at chambers, and not as a court, had no jurisdiction to issue the mandamus for the disobedience of which the order pun-

People v. Donovan.

ishing the defendant for contempt was made. If this point is well taken, it disposes of the case, and the orders of the special and general terms must be reversed; for it is a clear proposition that an order made by a court or judge in a proceeding of which the tribunal or officer [1] had no jurisdiction, and which is not merely irregular or erroneous, is not a lawful mandate, and disobedience thereto cannot be punished as a contempt (*Code Civ. Pro.*, § 8; *Eng. & Am. Ency. of Law*, 788, and cases cited).

The power to issue the writ of mandamus was at the common law lodged exclusively in the Court of King's Bench, because of the general superintendence it exercised over all inferior jurisdictions, and, unless conferred by statute, could be exercised by no other court in the realm. It was one of the prerogative writs, and if any trace is to be found of an attempt by any other court to exercise the jurisdiction, in the absence of a special statute conferring the authority, it was in the nature of a usurpation (*Audley v. Jay*, *Poph.* 176; 2 *Blk. Com.*, 110; *Moses on Mand.*, 16; *People ex. rel. v. Green*, 58 *N. Y.*, 296). The jurisdiction resided in the court and not in the individual judges, and the writ was issued in term and not in vacation.

In colonial times the supreme court of the colony of New York, by the ordinances of 1699 and 1704, was invested with all the powers of the courts of King's [2] Bench, Common Pleas and Exchequer in England, and by the Revised Statutes (2 *R. S.*, 3d ed., p. 259, § 1) the supreme court of the State was declared to be vested with all the powers and jurisdiction which belonged to the supreme court of the colony of New York, with certain exceptions not now material to be noticed. The same statutes regulated proceedings by mandamus, and while they do not expressly limit the power to issue the writ to the supreme court, or prohibit its being issued by a judge out of the court, they assume that the power

People v. Donovan.

inheres alone in this supreme jurisdiction and is to be exercised by the court as such (2 Rev. St., 608, Tit. Writs of Mandamus and Prohibition).

The statute of 1873, chapter 239, has been construed as conferring upon certain other courts the power to issue the writ (People *ex rel. v. Green, supra*), and it may [4] be conceded that the Legislature could authorize the writ to be issued by a judge in vacation, although it is difficult to see how such a jurisdiction could be conveniently exercised, in view of the fact that the proceeding by mandamus is substantially an action which may involve pleadings, issues, trial and final judgment upon the right, unless the power of the judge acting in chambers and not as a court could be restricted to issuing the writ returnable before the court, as is the procedure in some of the States.

The power of the judge to issue the writ involved in the present appeal is placed on section 770 of the Code of Civ. Pro., which declares that "in the First Judicial [5] District a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits."

The argument is that an application for a writ of mandamus is under the Code a motion, and that the writ when issued is an order, and that, although elsewhere [6] it can only be issued on application to the court, and not by a judge out of court, nevertheless, in the First District, under the section quoted, the motion may be made before, and the writ may be issued by, a judge at chambers.

It is to be observed that section 770 of the Code of Civ. Pro. is substantially a re-enactment of section 401 of the Code of Procedure. But the former Code [7] expressly excepted mandamus proceedings from its operation (§ 471), and under that Code a judge out of court in the First District had no power in mandamus proceedings other or greater than was possessed by any

People v. Donovan.

other judge in any other part of the State. It seems to be clear that, under the former Code, a judge out of court could not have issued a mandamus, as that power, by practice and the general understanding, could not be exercised only by a court, and could not be exercised by a judge out of court.

It remains to consider whether the Code of Civil Procedure has enlarged the power of a judge in the First

District so as to enable him to issue a mandamus out [8] of term or when not sitting as a court. Prior to the enactment of the Code of Civil Procedure, the writs of habeas corpus, mandamus, prohibition, &c., were regulated by statutes, and the practice of the courts. In the Code of Civil Procedure these statutes and the practice thereunder were brought together and codified under the title "Special proceedings instituted by State writ," and the writs above enumerated were denominated State writs. The several writs are treated of in separate articles, and the procedure is regulated with great detail. The respective articles define how and when, and by what authority writs to which they severally relate may be issued. The power to issue writs of habeas corpus was, for obvious reasons, conferred upon both the supreme court and special or general term, and upon judges out of court, and judicial officers authorized to perform the duties of a judge (§ 2017).

But the article relating to writs of mandamus expressly confines the power to issue the writ to a court at special or general term. Section 2068 is as follows: "Ex- [9] cept where special provision is made therefor in this article, a writ of mandamus can be granted only at a special term of the court. In the supreme court the special term must be one held within the judicial district embracing the county wherein an issue of fact founded upon an alternative writ is triable as prescribed in this article. The following section (2069) prescribes in what cases the writ may or shall be granted at general term.

People v. Donovan.

Section 2069 contains the only provision in the [19] article which permits any tribunal or other than the special term to grant the writ.

The right of a judge out of court to grant the writ seems to be necessarily excluded by the language of section 2086, since there is "no other provision in the [21] article" conferring upon a judge out of court the authority. Even if an application for a writ of mandamus is a motion within § 768 of the Code of Civ. Pro., it is taken out of the operation of § 770 by the peremptory and unequivocal language of § 2068. In the article relating to writs of prohibition are sections limiting the power to issue those writs to the court at special or general term, substantially as in the case of mandamus.

It is difficult to suppose that the power to issue the extraordinary writ of prohibition was intended to be vested in a judge out of court, under the language of § 770, and yet this result would follow if the construction placed by the courts below upon the power of a judge to issue a mandamus is correct; the language of the statute in both cases being substantially the same.

We find it impossible to avoid the conclusion that [23] a judge at chambers in the City of New York, or elsewhere within the State, has no jurisdiction to issue a writ of mandamus.

The right of a voter to vote may be lost unless this power shall be conferred. Under the statute, no court can be opened within the State on the day of any [25] general election to transact any business, except for the purpose of receiving a verdict or discharging a jury, and for the exercise by a single magistrate of certain jurisdiction in criminal cases (§ 5, tit. 1, chap. 130, Laws of 1842, as amended by § 2, chap. 240, Laws of 1847).

The voter who is refused the right to vote can resort to no court for relief until after his right is lost, as no court can entertain his application on election day.

National Broadway Bank v. Hitch.

If an enlarged jurisdiction in these cases is expedient, the remedy is with the Legislature.

Voters outside of New York can have no relief by mandamus issued on the day of election, and we think the voters of that city, under the arrangements of the statute, are in the same situation.

Our conclusion requires a reversal of the orders of the special and general term.

All concurred, except GRAY, J., dissenting.

NATIONAL BROADWAY BANK IN THE CITY OF
NEW YORK, RESPONDENT, v. HITCH, IMPLEADED,
ETC., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, DE-
CEMBER, 1892.

§§ 1282-1292.

Judgment—when laches will defeat motion to set aside—when not set aside because of error in law.

Where, by the entry of judgment against two defendants, a third defendant, who was jointly liable with the others for the debt sued upon, was merged in the judgment, and such defendant discharged from liability thereon, the court cannot, by vacating the judgment entered against his co-defendants, create a new liability against him.

A right of action once extinguished, as by merger, though for ever so short a time, is gone forever, and can never again be revived.

No relief can be granted by a motion to set aside a judgment where the ground of the motion is an error of law; and where it is an error of fact not arising upon the trial, the motion should be made within two years, or the court cannot, upon that ground, grant any relief.

It seems that the supreme court has power to open defaults and vacate judgments independent of the provisions of the Code of

National Broadway Bank v. Hitch.

Civil Procedure, and that this power inheres in the very constitution of the court, which said power can only be exercised where the relief relates to a judgment or order affecting only the original parties to the proceeding, and does not affect, impair or destroy the vested rights of the third person.

(Decided, December, 1892.)

Appeal by the defendant, Hitch, from an order of the special term vacating a judgment entered in this action against the defendant, Swift.

The facts appear in the opinion.

Henry A. Foster, for defendant Hitch, appellant.

William F. MacRae (*Kelly & MacRae*, attorneys), for plaintiff, respondent.

O'BRIEN, J.—This appeal brings up for review an order granting leave to plaintiff to vacate a judgment in its favor entered against two of the defendants. This action was brought in June, 1886, on a promissory note made by the defendants under their firm name of H. H. Swift & Co., which firm was composed of Humphrey H. Swift, Alfred G. Swift and Henry F. Hitch. The defendants Swift separately appeared and interposed a demurrer to the complaint, which was overruled and the action severed as to them by order of the court, and judgment upon the demurrer entered as against them. Thereafter an answer was served on behalf of Hitch, setting up the judgment thus entered against the Swifts as a bar. The plaintiff moved to overrule this answer as frivolous, which motion was granted, and a separate judgment was entered thereon against Hitch; but an appeal having been taken from the order overruling the answer as frivolous it resulted in this court reversing the order and judgment against Hitch. Thereafter the cause was placed on the calendar for trial, and, although once set down for the 17th

National Broadway Bank v. Hitch.

of June, 1892, it did not come up until after the plaintiff's application to vacate the judgment as to the other defendants Swift, which was granted: and from such order this appeal is taken.

It will thus be seen that the plaintiff, while correct in his view that the defence of Hitch was not a meritorious one, was in error in assuming that it was bad in law.

Throughout the litigation and down to the decision of the court of appeals in June, 1892, in the case of *Heckemann v. Young* (45 St. Rep., 846), the plaintiff refused to assent to the doctrine laid down in that case, which held that "it is the rule of the common law, recognized and enforced by the courts of this State, except as modified by section 1278 of the Code of Civil Procedure" (relating to judgments by confession), "that a judgment rendered against one of several joint debtors in an action against him alone is a bar to an action against the others."

From 1886 to 1892, a period upward of five years, the plaintiff knew that the defendant Hitch relied upon this rule of law as a defense; and the excuse presented for not making the motion sooner was principally based upon the error into which the plaintiff seems to have fallen as to the law governing the liability of joint debtors, and the rule that the entry of judgment against any, merged the claim, and would release from obligation the other joint debtors.

In addition, the respondent undoubtedly had confidence in the validity of the order obtained by him severing the action as to the parties hereto, and reliance upon the efficacy of the order so entered may for a time have prevented him from moving. As, however, the section of the Code (456) relating to the severance of parties has reference to cases where persons are severally, and not jointly, liable, the entry of such order did not prevent, upon the entry of the judgment against two of the joint debtors, the merging of the entire debt and the releasing of the other joint debtor.

National Broadway Bank v. Hitch.

Assuming, however, that the laches in moving could be excused, the question would still be presented whether the plaintiff could obtain any relief, whether the mistake in entering the judgment was one of law or of fact. That no relief can be afforded upon the first ground we think is settled by the cases of *Jacobs v. Morange* (47 N. Y., 57) and *Weed v. Weed* (94 N. Y., 243, 247). If, however, it could be regarded as an error in fact not arising upon the trial, then, not having been made within two years, the court could not, upon this ground, have afforded any relief (Code, §§ 1290, 1291).

But the respondent insists that the court has full and inherent power over its judgments to amend or vacate them, and is not confined or limited in its action by section 724 of the Code or the sections 1290, 1291 last referred to.

It is true, as held in the cases referred to by the respondent, that this court has power to open defaults and to vacate judgments, and that such power does not depend upon section 724, but exists independently of that, and inheres in the very constitution of the Court (*Vanderbilt v. Schreyer*, 81 N. Y., 646; *Dinsmore v. Adams*, 48 How., 274).

But while the court has ample power in respect to the correction of omissions or mistakes, and can grant relief to a party "from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," it can only exercise such power where the relief relates to a judgment or order affecting only the original parties in the proceeding, and does not affect, impair, or destroy vested rights of third persons. The difficulty that is presented, and which rendered the court upon the motion powerless to grant relief against "the technical and harsh rule of the common law," resulted from the fact that, by the vacating of this judgment, a new liability was created against the defendant Hitch. That this is so becomes apparent when we

National Broadway Bank v. Hitch.

consider the situation of the parties at the time the motion to vacate the judgment was made. It being now conceded that the liability of Hitch for the partnership debt was wholly extinguished by the entry of judgment against his partners, the only purpose sought to be served by vacating such judgment is to create a new liability on his part to the plaintiff, or, what is the same thing, resuscitate the extinguished liability by vacating the judgment against his partners. This, we think, the court was powerless to do.

We have been referred to no authority changing the rule at common law, "that a right of action once extinguished, as by merger, though for never so short a time, is gone forever and cannot again be revived" (*Sinclair v. Hollister*, 41 *St. Rep.*, 350; *People v. Bowe*, 81 *N. Y.*, 45; 2 *Blackstone's Com.*, 177; 3 *Stephen's Com.*, 316). On the other hand, while no precedent for the precise question here presented is afforded by the decisions of our own State, we are referred by the appellant to some English cases which uphold this rule of the common law relating to the revival of a cause of action once extinguished, and go to the extent of holding that a court has no power to create a new liability by vacating a judgment which merged the debt and discharged the person sought to be held liable thereon (*Hammond v. Schofield*, *L. R. Q. B. Div.*, vol. 1, 1891, p. 453; *Odell v. Cormack*, *L. R.*, 19 *Q. B. Div.*, 233; *The Belcairn*, *L. R.* 10 *Pro. Div.*, 161).

We think, therefore, apart from the question of plaintiff's laches in moving, that the principle contended for by appellant is correct; that, inasmuch as the judgment against his copartners merged the partnership debt and discharged the defendant Hitch from liability thereon, the court could not create a new liability against Hitch by vacating it. We should have been pleased to have found support for the position of the learned judge below in seeking to relieve the plaintiff from the harshness of the rule at common law, but, as the relief sought to be

Simmons v. Hazard.

obtained was beyond his power to grant, our conclusion is that the order appealed from must be reversed, with costs and disbursements, and the motion to vacate denied.

VAN BRUNT, P. J., and BARRETT, J., concurred.

SIMMONS AS ADMINISTRATOR, ETC., OF SIMMONS, DECEASED, RESPONDENT, v. HAZARD *et al.*, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, OCTOBER, 1892.

§§ 870 *et seq.*, 873.

Examination of party before trial—when affidavit of attorney insufficient—residence of parties how stated.

An affidavit to procure an order for the examination of a party before trial, if made by the attorney for the party applying therefor, should be made either upon knowledge, or, if upon information and belief, should state the sources of the information and belief, and it is insufficient where it states that it is made upon knowledge arising from the complaint in an action where the complaint itself is upon information and belief.

An attorney applying for an order for the examination of an adverse party before trial should have personal knowledge of the facts upon which such order is sought to be obtained, or in the absence of such knowledge where he moves upon statements made upon information and belief, the source of the information should be given.

Simmons v. Hazard (58 Hun, 119), followed.

Where it is not entirely clear as to whether an attorney, upon whose affidavit an order was granted for the examination of a party before trial, intended to asseverate his personal knowledge of the facts, alleges or merely that his knowledge consisted of allegations made in a complaint upon information and belief, the

Simmons v. Hazard.

doubt arising from the attorney's formulation of the affidavit should not be resolved in his favor.

The necessity or importance of examining a party before rather than at the trial of an action is not shown by the naked statements in an affidavit "that the plaintiff intends to use the deposition taken pursuant to the order sought herein upon the trial of this action."

An affidavit to procure an order for the examination of a party before trial is insufficient where it fails to state the place of residence of parties to the action, and merely says instead, that their places of residence are unknown, without showing that inquiry has been made to ascertain them or that there is any difficulty in learning them.

Where, by an order for the examination of a party before trial, more than one defendant is sought to be examined, the affidavit upon which the order is made should state what is expected to be proven by each witness, and if either can furnish all of the testimony then only one should be examined, and if a part of such information rests with one, and another portion with the other of the witnesses named, then the information which is desired from each should be stated.

In an action brought by a policy holder of an insurance company to recover damages resulting to him from the alleged unlawful appropriation by the individual defendants of moneys of the corporation and the destruction thereof of a valuable business, testimony in regard to the number of the policy holders of the corporation, and as to whether or not a notice was issued for the collectment of an assessment, or an assessment collected for the purpose of paying the plaintiff's claim is not relevant or material, and an order for the examination of parties before trial, to obtain evidence with regard to such facts, should not be granted.

Orders for the examination of parties before trial are not to be granted of course, but are to be allowed upon compliance with the statutory requirements and in the exercise of a sound discretion.

(Decided, October, 1892.)

Appeal by the defendants, Hazard & Osborne, from an order of the New York county special term, denying a motion to vacate an order for their examination as adverse parties before trial.

The facts appear in the opinion.

Simmons v. Hazard.

Charles C. Leeds, for defendants, appellants.

Morse & Wessley, for plaintiff, respondent.

O'BRIEN, J.—The plaintiff was substituted for Celia R. Simmons, who originally appeared in this action for herself and others who might elect to join therein against the defendants (except the receiver), as directors and officers of the Co-operative Life and Accident Association of the United States, to recover damages, on the ground of alleged fraud in the management of the affairs of that company, misapplication and misappropriation of its funds, and unlawful disposition of its property.

Certain objections to the sufficiency of the order for the examination of these defendants were presented to the court and are relied on, which may be briefly referred to. It is insisted that the present affidavit is not in any material respect better or stronger than the one already judicially declared insufficient, as pointed out in the opinion of the presiding justice upon the former appeal (*Simmons v. Hazard*, 33 *N. Y. State Rep.*, 836). He therein says that the order "should have been vacated, if for no other reason, because the affidavit upon which it was granted was verified by the attorney for the plaintiff without any sufficient reason being given therefor." The present affidavit is again verified by the attorney, but from it it appears that the original plaintiff has since died, and that the present plaintiff is ignorant of the facts going to constitute the cause of action, and the present attorney swears that the facts are within his personal knowledge. If, however, we examine the affidavit, in view of this positive statement of the attorney, and its reference to the complaint, which is upon information and belief, it is subject to the criticism that the attorney's knowledge is derived from the statements contained in the complaint, and that the facts are known to the attorney to be stated in the complaint; but the attorney nowhere asserts that

Simmons v. Hazard.

he has now or ever had any personal knowledge of the facts thus alleged.

As said in the opinion upon the former appeal: "These affidavits should be made by the party, he or she being the only one who can asseverate, as to his or her own knowledge or information, material allegations. There is nothing in the affidavit under consideration to show that the attorney had any peculiar knowledge as to any of the facts necessary to be established."

We do not think, therefore, where an affidavit to support an order of this kind makes reference to a complaint which is made upon information and belief, that a statement by such attorney that he has knowledge of such allegations in the complaint is sufficient. What is required is that the person applying for the order should have personal knowledge of the facts upon which the right to such order depends, or, in the absence of such knowledge, where he moves upon statements made upon information and belief, the sources of the information should be given. Had the attorney here stated that he knew the facts of his own knowledge and the circumstances under which such personal knowledge was acquired, we think it would have been sufficient. But where, as here, such knowledge consists of the allegations of a complaint made upon information and belief, it is clearly insufficient. It may be that the attorney intended to asseverate his personal knowledge of the facts; but as this is not entirely clear, the doubt arising from the attorney's formulation of the affidavit is not to be resolved in his favor.

Apart from this, however, there are other and more serious defects shown upon the papers. No reason is assigned showing the necessity or importance of the examination before, rather than at, the trial, or for supposing that the defendants could not be had as witnesses at the trial. The only attempt to comply with this requirement is the bare, naked statement which is clearly insufficient, "that the plaintiff intends to use the deposition taken

Simmons v. Hazard.

pursuant to the order sought herein upon the trial of this action."

Another defective statement is that the places of residence of the defendants Mersereau and Osborn are unknown. With respect to both of these it was shown that their names and residences appeared in the New York City Directory, that of the defendant Osborn having regularly and correctly appeared for more than thirty years past. The section requires that the names and residences of all the parties to the action should be stated; and this cannot be held to have been complied with by a bare statement that they are unknown to the affiant, without some evidence being furnished that inquiry has been made to ascertain them, coupled with some fact showing that there is difficulty in learning them.

We think, too, that where, as here, more than one defendant is sought to be examined, what is expected to be proved by each witness should be stated. The affiant states "that it is material and necessary for plaintiff to prove the number of members of said insurance company at the time of the death of plaintiff's insured, also the sending out and collecting of an assessment for the purpose of paying plaintiff's claim, which assessment was sent out and collected, as deponent believes from a card containing the same, which is in deponent's possession, all of which facts are within the knowledge of said Hazard and Osborn."

Assuming such facts to be material and necessary, if either of these witnesses can furnish the testimony, then no reason exists for the examination of the other; and if only a part of such information rests with one and another portion with the other of the witnesses named, then the information which is desired from each should be stated. We think, however, there is grave doubt as to whether such evidence is at all material and necessary, or as to whether or not it is within issues framed by the pleadings.

Simmons v. Hazard.

The action itself is to recover damages resulting to plaintiff from the dishonest management of the corporation, and for the unlawful appropriation of some \$46,000 to the use of certain of the defendants named, and the destruction of a valuable business worth \$500,000. The relevancy and materiality to such a cause of action of testimony in regard to the number of policy holders, and as to whether or not there was issued a notice for the collection of an assessment, or an assessment collected, for the purpose of paying plaintiff's claim, are not apparent. It is true that great liberality is allowed with respect to the examination of parties where, by reason of their peculiar relations of trust or confidence to the plaintiff, the latter necessarily relied upon the good faith and honesty of such persons. In these cases, in the absence of personal knowledge, and upon a showing that the plaintiff has ground to suspect the good faith of persons holding to him either the relation of trustee or agent, an opportunity to examine such persons should be afforded. The principle of those cases, however, is easily distinguishable from the present. Here the plaintiff charges the defendants with the dishonest appropriation to their own use of moneys of a corporation in which his intestate was a policy holder. It is but fair that such charges should be made upon the personal knowledge of those in possession of the facts, or that such information and the sources thereof should be stated as to furnish a reasonable ground for concluding that the charges thus made were in good faith honestly entertained, and that the information sought to be elicited was necessary and material, and such as should be furnished to the plaintiff now rather than compel him to await the trial of the action.

It should be remembered that these orders are not to be granted as of course, but are to be allowed upon compliance with the statutory requirements, and in the exercise of a sound discretion. If we may disregard any, we may disregard all of the statutory requirements, be-

 Schwartz v. Wechler.

cause it is not easy to determine, if any can be dispensed with, which ones are essential. It would have been proper for the Legislature, had that been the policy, to have allowed examinations of parties and witnesses before trial as of course, and without making the same depend upon compliance with certain requirements of the Code. In what respect these have been violated, we have again, as upon the former appeal, endeavored to point out. And to the end that the plaintiff may have another opportunity of complying therewith, we have concluded the order appealed from such should be reversed, and that, upon payment of the costs and disbursements of this appeal, the plaintiff should be allowed to renew the application upon new papers.

VAN BRUNT, P. J., and LAWRENCE, J., concurred.

SCHWARTZ, RESPONDENT v. WECHLER *et al.*, APPELLANTS.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, DECEMBER, 1892.

§§ 500, 1919 *et seq.*, 1923.

Unincorporated association—when members of, may be sued on claim owing by, although president or treasurer has not been—Pleading—nonjoinder of defendants—District court of the City of New York—power to set aside judgment—reversal on appeal.

The members of an unincorporated association of more than seven members may be sued upon a cause of action existing against the association, notwithstanding no action has been brought against the president or treasurer thereof as such.^[1.6]

Humbert v. Abeel (7 N. Y. Civ. Pro., 417); ^[4.6] Hunson v. Spauld-

Schwartz v. Wechler.

ing (25 *St. Rep.*, 256, *S. C. 6 N. Y. Supp.*, 877), [6] followed; *Whitherhead v. Allen* (4 *Abb. Ct. Ap.*, Dec. 28) distinguished and not followed; [3,4] *Flagg v. Swift* (25 *Hun*, 623), not followed. [2,6]

The defense of a nonjoinder of parties-defendant is insufficient where the names of the persons, who it is claimed should have been made additional parties to the action, are not stated.[7]

A judgment of the district court in the City of New York will not be reversed on appeal, because of the alleged nonjoinder of necessary parties-defendant where no evidence in support of that defense was introduced upon the trial.[8]

A justice of a district court in the City of New York has no power to set aside the verdict rendered by a jury in a case tried before said court.[9,11]

Upon appeal to the court of common pleas from a district court in the City of New York, the judgment appealed from will not be reversed upon a question of fact where there is a conflict of evidence, unless the evidence was of such a character as to clearly indicate that there was a mistake on the part of the jury; that they were influenced by bias, passion, prejudice or corruption, or they manifestly failed to deliberate upon the whole testimony. [12]

(Decided, December 5, 1892.)

Appeal by the defendants, Joseph Eichner, Ignatz Bleich, and Mandel Friedman, from a judgment entered upon the verdict of a jury in the district court in the City of New York for the Fifth Judicial District, in favor of the plaintiff.

The facts are stated in the opinion.

Sigmund Feuchtwanger, for defendant, appellants.

Abraham H. Sarasohn, for plaintiff, respondent.

GIEGERICH, J.—This action was brought against Morris Wechler, Joseph Eichner, Ignatz Bleich, and Mandel Friedman for services rendered by the plaintiff and his

assignor as teachers in the school known as the Oestreicher Hungarische Talmud Torah at No. 102 Cannon Street, in this city—it being claimed by the plaintiff that the school was conducted by a voluntary association bearing said name, and of which the defendants were directors and members.

The defendants denied that they individually and for themselves engaged the plaintiff and his assignor, but claimed that they were originally employed by them, or some of them, and others on behalf of the association, which is not disputed by the plaintiff and his assignor.

The defendants also claimed that in or about the month of November, 1891, in consequence of the withdrawal by parents of their children from the school in question the association was unable to pay the teachers any longer, and as an inducement to them to teach it was agreed between the teachers, including the plaintiff and his assignor, on the one hand, and the association on the other, that the former were not to receive any further compensation from the latter for teaching the children, but were to look solely to the scholars of the school for compensation; that the plaintiff and his assignor expressed themselves as satisfied with that arrangement and continued to teach school under it. This was denied by the plaintiff, and the jury credited his version of the case.

The defendants contended upon the trial and now

[¹] urge as a ground for the reversal of the judgment, that the action cannot be maintained against the defendants as members of the association, because no action has been brought against the president or treasurer thereof. The case of *Flagg v. Swift* (25 *Hun*, 623), is

[²] cited in support of the contention. In that case it was decided that an action cannot be maintained against the individual members of an unincorporated association upon a debt due from the association unless an action has first been brought against the president or

Schwartz v. Wechler.

treasurer thereof as prescribed by section 1919 of the Code of Civil Procedure. This decision is based ['] upon *Witherhead v. Allen* (4 *Abb. Ct. App.*, Dec. 28), which arose under the Act of 1849, chapter 258, as amended by the laws of 1853, chapter 153, section 4. The same provides that after judgment against the joint stock company or association and execution thereon is returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually, as now provided by law. The remaining provisions have no bearing on the question under consideration and are therefore omitted.

As was well said by WILLIAMS, J., in *Humbert v. Abeel* (7 *N. Y. Civ. Pro.*, 417, 421), "under those provisions, it could not be held otherwise than it was held in *Witherhead v. Allen*; but under the provisions of the Code of Civil Procedure, the rule must be held entirely different." Section 1923 of the Code prescribes that "This article (Chap. 19, Art. 1, Title V.) does not prevent an action from being brought by or against all the members of an association except as prescribed in the last section." Section 1922 prescribes: "Where an action has been brought against an officer, or a counterclaim has been made in an action brought by the officer, as prescribed in the last three sections, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon." Mr. Throop in his notes on the new Code (Edition 1891, p. 210), says: "The provisions of this article are permissive and remedial." Again, on the same page he says: "The prohibitory clause of section 4 of the Act of 1849 as amended in 1853 has therefore been omitted; and to guard against a possible misconstruction of this article, an express provision, declaring it to be permissive, has been added as section 1923."

Schwartz v. Wechler.

The right to maintain an action against the members of an unincorporated association without first obtaining a judgment against the association is, therefore, expressly given by section 1923 of the Code, and it follows that it was not necessary for the plaintiff as a condition to the maintenance of this action to first bring suit against the president or treasurer of the association.

This conclusion is in accord with the views expressed by the court in *Humbert v. Abeel* (*supra*), and *Hudson v. Spaulding* (25 *St. Rep.*, 256 s. c., 6 *N. Y. Supp.* 877), regarding the right to maintain an action against the members of an unincorporated association. It is manifest that the provisions of the Code above cited were either disregarded or overlooked by the court in *Flagg v. Swift*, *supra*.

The appellants contend further that the present action is not maintainable because all the members of the association were not made parties defendant. The record shows that the defendants answered as follows: "Defendants Bleich and Friedman, non-joinder defendants, general denial; other defendants plead general denial." This is clearly insufficient, because the names of the persons who it is claimed should have been made additional parties to the action are not stated. (*Hawks v. Munger*, 2 *Hill*, 200; *Wigand v. Sichel*, 3 *Keyes*, 120; *Fowler v. Kennedy*, 2 *Abb. Pr.*, 347-351; *Worster v. Chamberlin*, 28 *Barb.*, 602; *Maxwell v. Pratt*, 24 *Hun*, 448; *Kingsland v. Braisted*, 2 *Lans.*, 17; *Humbert v. Abeel*, *supra*.) *

Even had the alleged non-joinder been properly pleaded, the record shows that the defendants did not introduce any testimony in support of the same, and it seems that this defence was entirely abandoned by defendants upon the trial.

* This is so even where the names of omitted parties are unknown, and are stated to be unknown to plaintiff. *Humbert v. Abeel*, 7 *N. Y. Civ. Pro.*, 417; *Maxwell v. Pratt*, 24 *Hun*, 448; and cases there cited.

Schwartz v. Wechler.

Upon the coming in of the verdict, the defendants made a motion to set aside the verdict and for a new trial upon the following grounds, viz.: "That the [9] verdict is contrary to the evidence, and contrary to law, and is excessive; that there is no evidence authorizing a judgment for the amount of the verdict, and upon the exceptions taken upon the trial." The justice, with the consent of the plaintiff's attorney, reduced the amount of the judgment and denied the motion to set aside the verdict. In doing so he, among other things, said: "This is one of the cases where, if the power given to courts of record under § 939 of the Code was conferred on this court, I would not hesitate to set aside the verdict, but the limits within which this court can act puts it out of my power in this case, to afford the defeated party any relief, and the corrective remedy must be sought, if at all, in the appellate court, where, under the provisions of the Code, matters involved in this motion can be reviewed. If there was absolutely no proof to support the verdict—in other words, if, without any evidence to support it, a verdict should be rendered—a different conclusion might be reached by me."

It is insisted that the court below had power to [10] set aside the verdict, but we have not been referred to, nor are we aware of, any statutory provision which authorizes the district courts of this City to set aside the verdict of a jury and grant a new trial.

The district courts are courts of inferior jurisdiction, and therefore cannot go beyond the authority conferred upon them by statute. They can assume no [11] power by implication, but must keep within the powers expressly given them, and if they go beyond them their acts are void (*Cowan's Treatise*, § 650; *Baumann v. Williams*, 18 *Abb. Pr.*, 158; *Howard v. Shipman*, 6 *Barb.*, 621). The only statutory provision which we have been able to find relative to the question under consideration, is § 1380 of the Consolidation Act, which provides that

Schwartz v. Wechler.

judgment must be entered immediately after the rendering of the verdict (Laws 1882, chap. 410), and it would seem from this that the Legislature intended to prohibit the justices of these courts from setting aside the verdict of a jury. At all events it is manifest that the exercise of the power to set aside a verdict is inconsistent with the provisions of the act referred to.

After carefully reading the testimony we are unable to see on what ground the justice could have granted a new trial, had he the power to do so. The issues to be determined were purely of fact. It has frequently [12] been held in this court that where there is a conflict of evidence the judgment will not be reversed unless the evidence be of such conflicting character as to clearly indicate that there was a mistake on the part of the jury, that they were influenced by bias, passion, prejudice or corruption, or that they had manifestly neglected to deliberate upon the whole testimony (*Darrah v. Boys*, 16 *Daly*, 209; *Wise v. Strauss*, 39 *St. Rep.*, 78). An examination of the evidence in this case does not lead to such a conclusion.

The case turned upon the question whether the plaintiff and his associates continued to teach under the original agreement whereby they were to be compensated by the association, or whether a new arrangement was made by which teachers were to look solely to the scholars for compensation. The testimony upon this point is conflicting, and as it was purely a question of fact, which was fairly submitted to the jury, the verdict should not be disturbed merely because, had the court below been on the jury, it might have reached a different result.

The verdict of the jury is sustained by the evidence, and we can find no reason to interfere with their determination of facts.

The judgment should therefore be affirmed, with costs.

BISCHOFF, JR., P. J., concurred.

Bulkley v. Moses.

BULKLEY v. MOSES ET AL.

CITY COURT OF BROOKLYN, SPECIAL TERM, APRIL, 1892,
§ 814.

Bond discharging mechanic's lien—when suit upon may be brought upon, without prosecuting to the end an action to foreclose the lien.

Where a bond has been given to the County Clerk and an order made discharging a mechanic's lien under laws of 1885, chap. 342, the lienor, after obtaining leave to sue, pursuant to section 814 of the Code of Civil Procedure, may maintain an action on the bond against the sureties therein, without first exhausting his remedy against the debtors in the lien, by procuring a judgment foreclosing the lien.

(Decided, April 13, 1892.)

Motion upon trial of action to dismiss complaint.

This was an action brought in the city court of Brooklyn against Moses and Fanton as principals, and Dowling and Anderson as sureties on a bond given under Laws, 1885, chap. 342, § 24, subd. 6, to discharge a lien filed by plaintiff for work and materials. The complaint alleged the contract, performance and filing of notice of lien, the giving of the bond to the clerk of the county, the entry of an order discharging the lien, and an order permitting the plaintiff to sue on the bond in his own name. (See *Code*, § 814.) A motion was made at the trial to dismiss the complaint as to the defendant sureties upon the ground that the plaintiff's remedy against the principals must first be exhausted.

Durant Land Improvement Co. v. Thompson-Houston, Etc.

Herman F. Koepke (J. C. & H. C. Smith & Koepke, attorneys), for plaintiff.

William North, for defendants.

CLEMENT, Ch. J.—I am inclined to follow the decision in *Copley v. Hay* (12 *N. Y. Supp.* 277). When money is deposited, the foreclosure is against the fund (*Ward v. Kilpatrick*, 85 *N. Y.* 413, 418). When a bond is given, as in this case, the lien is discharged, and the lienor can not foreclose against the land, and may sue upon the bond. The owners or persons against whom the lien is filed, execute a bond with two or more sureties in order to cancel the same. If the owner and contractor are different persons and the contractor files a bond, the owner has no interest thereafter for the lien is discharged.

DURANT LAND IMPROVEMENT CO., APPELLANT, v.
THOMPSON-HOUSTON ELECTRIC CO., RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1893.

§§ 1310, 2231 *et seq.*, 2262.

*Summary proceedings—when appeal from order in, does not act as stay
—when stay pending appeal from judgment for rent does
not prevent maintenance of summary pro-
ceedings.*

A demand for the amount of rent due without naming a sum is sufficient basis for summary proceedings.

A demand for rent owing by a corporation is properly made upon the person who was the president of the corporation, and as such

Durant Land Improvement Co. v. Thompson-Houston, Etc.

executed the lease, notwithstanding he has since tendered his resignation, where said resignation has never been acted upon, and no one has been elected to succeed him.

To complete the resignation of an officer of a corporation it is necessary that the corporation manifest its acceptance of the offer to resign.

Chemical Bank v. Colwell (132 N. Y. 250), distinguished.

A demand for, and default in the payment of rent is requisite to support a summary proceeding to dispossess a tenant for nonpayment of rent.

The right to recover rent, and the right to dispossess a tenant for nonpayment of rent are not inconsistent with each other, and the right to dispossess is not merged in a judgment recovered on a claim for rent, nor does the recovery of a judgment for rent prevent the making of a proper demand which shall be a foundation for summary proceedings, nor prevent the maintenance of summary proceedings. The remedies are independent and collateral, and not merged one in the other.

The effect of a stay, pending and to perfect an appeal from a judgment for rent, is to stay the proceedings to enforce the judgment already rendered, and such proceedings as may be instituted by the respondent for the purpose of enforcing the provisions of the judgment, and as a proceeding to dispossess the tenant is neither the right under the judgment, nor an effort to obtain the fruits of the judgment, the judgment and stay on appeal does not impair the tenant's liability for the rent, or the landlord's right to receive it, and will not prevent the making of a demand for and refusal of payment of rent which may be a foundation for summary proceedings, nor does it prevent the maintenance of summary proceedings.

It seems that security on appeal from an order of dispossess in summary proceedings will not operate as a stay of its enforcement.

(*Decided, January, 1893.*)

Appeal by the landlord from a final order of a district court in the city of New York, dismissing summary proceedings brought to recover the possession of real property.

The East River Electric Co. leased from the landlord in this case, the Durant Land Improvement Co., certain premises in the city of New York under an agree-

Durant Land Improvement Co. v. Thompson-Houston, Etc.

ment made in 1887 providing that the tenant should take possession of a portion of the premises in question, that the landlord should put the entire premises in repair, that the lease should commence May 1st, 1888, and continue for the term of 33 years, with the privilege to the tenant of two renewals of said lease of 33 years each.

The tenant took possession accordingly, and sub-let to the respondent on this appeal. Subsequent to May 1st, 1888, the landlord commenced to make certain repairs under the lease, and the tenant failed to pay the rent because of interference with their use of said premises by the making of said repairs. The landlord instituted summary proceedings, which were decided in favor of the tenant, and an appeal was taken by the landlord which resulted in a reversal of the justice's determination. (See Report of opinion, Durant Land Improvement Co. v. East River Electric Co., 17 *N. Y. Civ. Pro.*, 224.)

Thereafter the tenant brought an action against the landlord under the provisions of the lease providing that if the landlord, in making alterations and repairs excluded the tenant from any part of the demised premises, "the rent reserved on such part thereof as shall be justly proportionate to the portion or portions of the said demised premises of the use of which" the tenant shall be deprived because of the control thereof by the landlord, shall be suspended or abated, and asked for an apportionment of the rent pursuant to said provision.

The landlord interposed a counter-claim for the rent due, and upon the trial the landlord recovered judgment against the tenant for the amount of said counter-claim; the tenant thereupon took an appeal, and gave security to stay proceedings pending the appeal. Thereafter the landlord made a demand for the same rent for which he had recovered judgment in that action, and upon the failure of the tenant to pay it, brought the summary proceedings which resulted in the order from which this appeal was taken.

Durant Land Improvement Co. v. Thompson-Houston, Etc.

Esck Cowan & Charles J. Hardy, for landlord, appellant.

William B. Putney, Eugene S. Ives & Henry B. Twombly, for tenant, respondent.

PRYOR, J.—We have given to the case the consideration due to its importance, and to the novelty of the point upon which its decision is suspended.

Whether the order shall stand depends upon the correctness of *three* propositions affirmed by the trial justice in favor of the respondent, namely: that no due demand of the rent was made; that the demand was not made upon the tenant; and that, because of a judgment for the rent in behalf of the appellant, and an undertaking given by the respondent on appeal from that judgment, there was no effectual demand, and so no default.

As to the first proposition: It appears by the return that the landlord made demand of the "amount due for rent;" that the amount due had been ascertained and determined by a judgment between the parties, and that of this judgment the respondent had actual notice. The demand, therefore, was, in effect, of the sum so judicially decided to be due for rent. Demand of the amount of rent due, without naming the amount, is sufficient. (*McLean v. Spratt*, 20 Fla., 515; *McAdam on L. & T.*, 681.)

In reason, moreover, the tenant may be presumed to be as well apprised of the sum he owes as the landlord of the sum owing him.

The technicality requisite at common law to a forfeiture of the tenant's estate for rent in arrear, has no place in a summary proceeding before a justice; since, manifestly, the strict observance of that technicality is incompatible as well with the nature of the remedy as the character of the tribunal administering it. To complicate and encumber the proceeding with a vain ceremonial that would

Durant Land Improvement Co. v. Thompson-Houston, Etc.

frustrate its policy and effect cannot be within the legislative intent.

But, however this may be, it follows from our adjudication in a former litigation between these same parties, that no precise amount need be named in the demand for rent, in order to institute a proceeding of summary dispossession (15 *Daly*, 337).

Equally untenable is the position that the demand was not made upon the tenant. That tenant was a corporation, and the demand was made of the person who executed the lease as president of the company, who said he was president, and that he had resigned, but his resignation had never been acted on; that as far as he knew he was president of the company. The statement being merely an extrajudicial declaration, was incompetent evidence; but it was admitted without objection, and, in the case, has all the effect of valid proof. We are of opinion that, in the absence of countervailing evidence, it is sufficiently shown that the person of whom the demand was made was then president of the respondent company. "To complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign" (*Willcock on Corporations*, 239; 1 *Kyd on Corporations*, chap. 3, sec. 4; *Van Orsdall v. Hazard*, 3 *Hill*, 243; *Edwards v. U. S.*, 103 *U. S.*, 471; 17 *Am. & Eng. Ency. of Law*, 169). It is not apparent that this common-law rule has been abrogated in the State of New York. The decision in *Chemical Bank v. Colwell* (132 *N. Y.*, 250) proceeded upon the principle that the director ceased to be such by the transfer of the stock, ownership of which was a necessary qualification for the office. At all events, in the case at bar, it seems from the president's statement that his resignation was contingent on its acceptance.

Avowedly, the respondent's real reliance is upon the proposition that, because of the judgment for rent and the stay on appeal, the rent was not legally demandable, and a default in payment not legally possible. A demand

Durant Land Improvement Co. v. Thompson-Houston, Etc.

and a default in payment were requisite to support the proceeding (Code, § 2231, sub. 2).

What, then, was the effect of the judgment and the undertaking on appeal upon respondent's obligation to pay, and appellant's right to demand, the rent?

Indisputably the judgment operated a merger of the cause of action for rent in the sense and with the effect that "all its powers to sustain rights and enforce liabilities terminated in the judgment, and could not again be used as the foundation of a suit between the same parties" (15 *Am. & Eng. Ency. of Law*, 336). In other words, the claim for rent was transmuted into a higher security, and instead of resting in covenant, became a debt of record. But the right was not extinguished; on the contrary it was made certain and invulnerable by the judgment. Nor did the judgment pay the rent, but only authenticated and confirmed the claim to it by an unimpeachable security.

What effect, again, had the judgment on the right to prosecute this proceeding? The proceeding is upon the lease, but is not to recover the rent; and judgment of dispossession does not determine the amount of rent due (*Kelly v. Miles*, 48 *Hun*, 6). The proceeding is in pursuit of another independent and collateral remedy available by law to the landlord, namely: to recover the land for default in the rent. The right to reclaim possession and the right to recover rent are not inconsistent; for, after dispossession of the tenant he may still be sued for the very rent which was the occasion of his dispossession. That the extinction of the one remedy—an action for rent on the lease—does not involve an extinction of the other collateral and independent remedy—recovery of possession for non-payment of rent is plain upon principle, and is settled by authoritative adjudication. "The rule that security of a higher nature extinguished inferior securities will be found to apply only to the state or condition of the debt itself, and means no more than this, that when

Durant Land Improvement Co. v. Thompson-Houston, Etc.

a judgment is taken upon a debt, the debt, *as to its original or inferior condition*, is extinguished or swallowed up in the higher. * * * It has never been applied, and never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. *They are to be cancelled only by satisfaction of the debt*" (Butler v. Miller, 1 N. Y., 496, 500). "A judgment upon a contract technically merges the demand, but not in so complete a sense that the courts may not look behind the judgment to see upon what it is founded, for the purpose of protecting the equitable rights connected with the original relation of the parties" (Clark v. Rowling, 3 N. Y., 216).

The judgment interposing no bar to the proceeding, the remaining question is, was it arrested by the undertaking on appeal from the judgment?

The contention of the respondent is that the stay in the action for rent effected by the undertaking operated a suspension of appellant's right to demand the rent in the proceeding for dispossession, and that, as the appellant had no right to demand, the respondent is not in default by refusal.

The effect of a duly perfected appeal is to "stay all proceedings to enforce the judgment appealed from" (Code, § 1310). In Ireland v. Nichols (40 How., 85, 86) the court says: "The proceedings here referred to must be construed to mean such proceedings as may be instituted by the respondent for the purpose of enforcing the provisions of the judgment." In Money v. Tracey (92 N. Y. 581, 583), the court held that a stay on appeal is effectual only against a proceeding "to enforce the plaintiff's rights under the original judgment, or to obtain the fruits of it." That the proceeding to dispossess is neither an enforcement of appellant's rights *under the judgment*, nor an effort to obtain the fruits of that judgment, is too obvious for argument. Appellant's right under the judgment was to the rent in arrear, and *that* he neither sought to recover nor could recover in the present proceeding. The

Durant Land Improvement Co. v. Thompson-Houston, Etc.

"fruits" of the judgment was the money thereby recovered, but the object and end of this proceeding is not that money, but simply possession of the premises.

Nor does a stay on appeal impair or affect the right determined by the judgment, but only arrests all further proceedings to enforce it (*Bowman v. Tallman*, 19 *Abb.*, 84; *Matter of Berry*, 26 *Barb.*, 55; *Ward v. James*, 8 *Hun.*, 526).

Hence the inevitable corollary, that the judgment and stay on appeal did not impair respondent's liability for the rent or appellant's right to receive it. Both the right and the liability still subsist, and though not in their original form, yet in their original vigor and validity. There was a right, therefore, on the part of the appellant to support its demand, and such a liability on the part of the respondent as made its refusal a default—provided the demand was not under or in enforcement of the judgment. That the demand was not under the judgment nor to enforce its provisions, but proceeded upon an independent and collateral right, and to enforce an independent and collateral remedy, is a self-evident proposition. The demand, therefore, was lawful and effectual, and respondent's refusal such a default as entitled the appellant to maintain the proceeding.

It is not irrelevant to remark, in construing the policy of the statute, that security on appeal from the order of dispossession itself, would not operate a stay of its enforcement (*Code*, § 2262; *Broadwell v. Holcomb*, 65 *How. Pr.*, 502).

Order reversed and new trial ordered; costs to abide event.

BOOKSTAVEN, P.J., and BISCHOFF, J., concurred.

KELLER, RESPONDENT, v. FELDMAN, APPELLANT,
NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
DECEMBER, 1892.

§§ 1294, 3191, SUBD. 3.

Appeal—does not lie from judgment by default—order denying motion to open judgment by default does not affect substantial right, and is not reviewable on appeal from city court of New York to court of common pleas.

An appeal does not lie from a judgment by default, and such an appeal must be dismissed, because of lack of jurisdiction to sustain it.

A substantial right, within the meaning of § 3191, subd. 3 of the *Code of Civil Procedure*, providing for the review by the court of common pleas of an order of the city court affecting a substantial right, is a legal right enforceable as such, and not resting at all in the discretion of the court, and consequently an order embodying a "determination of a court below, which is the result of the exercise of a discretion vested in that court, will not be reviewed in the court of appeals, and as the jurisdiction of the court of common pleas over the determination of the city court is exactly commensurate with the jurisdiction of the court of common pleas over its subordinate tribunals," the court of common pleas has no authority to review a discretionary order of the city court of New York.

Whether a default shall be opened is a question of judicial discretion, and an exercise of that discretion by the city court of New York is not reviewable by the court of common pleas.

Where upon the refusal of a justice of city court of New York to adjourn a trial, because of the absence of a witness, the defendant who asked the adjournment suffered a default—*Held*, that orders of adjournment were discretionary, and not appealable from the city court of New York to the court of common pleas; that an order refusing to open a default was also discretionary, and, there-

Keller v. Feldman.

fore, not reviewable by the court of common pleas, and an appeal from such an order should be dismissed.

Where the postponement of a trial of an action is asked because of the absence of an alleged material witness, and no effort to subpoena him or procure his attendance is made, this defect will properly sustain a denial of the application.

(Decided January, 1898.)

Appeal by the defendant from a judgment of the city court of New York, general term, affirming a judgment of its trial term, there entered by default, and also from an order of the general term affirming an order of the special term denying a motion to open the default.

John Henry Hull, for defendant, appellant.

Langbein Bros. & Langbein, for plaintiff, respondent.

PRYOR, J.—The record shows that when the action was called for trial the defendant failed to appear, and that thereupon his default was entered, and judgment rendered against him upon an assessment of damages.

No appeal lies from a judgment by default. The only office of an appellate tribunal is to review the determinations of the primary jurisdiction; and since a judgment by default involves no adjudication upon the issues in controversy, it follows that nothing is presented for revision by the court above (*Flake v. Van Wagnen*, 54 N. Y., 25, 28; *Innes v. Purcell*, 58 N. Y., 388; *Maltby v. Green*, 1 *Keyes*, 548). A judgment of affirmance by default is not an actual determination (*Stevens v. Glover*, 83 N. Y., 611; *McMahon v. Rauhr*, 47 N. Y., 67).—By express provision of the Code (§ 1294), a judgment by default is excepted from the privilege of appeal. Thus reason, authority and statutory enactment concur to the point that the appeal from the judgment must be dismissed, for lack of jurisdiction to entertain it.

As to the order upon appeal: It appears that when

Keller v. Feldman.

the plaintiff moved the cause for trial, the defendant asked an adjournment because of the absence of an alleged material witness. The request for the adjournment being opposed, was denied by the trial judge; whereupon, defendants' counsel withdrew from the litigation, and an inquest of damages was taken by the jury. Afterward, the defendant moved at special term of the court below to open the default and vacate the judgment; upon opposing affidavits the application was denied; on appeal from the order of denial it was affirmed by the general term, and from that order of affirmance an appeal is prosecuted to this court. The question is: Have we jurisdiction to entertain the appeal?

The argument of appellant imports that an order refusing to open a default affects a substantial right, and so is within the terms of the statute defining the appellate jurisdiction of the common pleas over the orders of the city court (*Code Civ. Pro.*, § 3191, *sub.* 3). But the reasoning is vitiated by a fatal fallacy, namely, in assuming that an order denying a motion to open a default affects a "substantial right." In the sense of this provision of the Code, a substantial right is a strict legal right, enforceable as such, and not resting at all in the discretion of the court (*Barante v. Deyermant*, 41 *N. Y.*, 355; *Foote v. Lathrop*, *id.*, 358, 361; *Martin v. Windsor Hotel Co.*, 70 *N. Y.*, 101, 103). Hence the "universal rule that an order embodying a determination of the court below, which is the result of the exercise of a discretion vested in that court, will not be reviewed in the court of appeals, although it affects a substantial right" (*Bailies on New Trials and Appeals*, 217-217; *Anonymous*, 59 *N. Y.*, 313, 315; *Smith v. Platt*, 96 *N. Y.*, 635-6; *Witkowski v. Paramore*, 93 *N. Y.*, 467; *Clyde v. Rogers*, 87 *N. Y.*, 625; *Lawrence v. Farley*, 73 *N. Y.*, 187; *Jenkins v. Putnam*, 106 *N. Y.*, 272). The appellate jurisdiction of this court over the determinations of the city court being exactly commensurate with the jurisdiction of the court of appeals over its subor-

Keller v. Feldman.

dinate tribunals, it results that we have no authority to review a discretionary order of the city court (*Robinson v. Cornish*, 12 *N. Y., Suppl.* 929, *G. T. Com. Pleas*; *McEteere v. Little*, 8 *Daly*, 167; *Walsh v. Schulz*, 12 *Daly*, 103; *Matter of Adler*, 60 *Hun*, 481, 483). But, whether a default should be opened is a question of a judicial discretion, and an exercise of that discretion by the city court is not reviewable by us (*Traiteur v. Livingston*, 13 *N. Y., Suppl.*, 603; *Miller v. Tyler*, 58 *N. Y.*, 477, 480; *Walsh v. Schulz*, 12 *Daly*, 103; *Wakefield v. The Am., &c., Co.*, 13 *Daly*, 349; *Robinson v. Cornish*, *supra*; *Judson v. O'Connell*, 14 *N. Y. Suppl.*, 92; *Clute v. Mahon*, 9 *N. Y. Suppl.*, 713; *Depew v. Dewey*, 56 *N. Y.*, 657; *Ferris v. Ferris*, 56 *N. Y.*, 614; *Smith v. Belden*, 60 *N. Y.*, 642; *Davis v. Borst*, 58 *N. Y.*, 669; *Wade v. DeLeyer*, 63 *N. Y.*, 318; *Matter of Loew*, 90 *N. Y.*, 666; *Stevens v. Glover*, 83 *N. Y.* 611).

The defendant suffered default because of the refusal of the trial court to allow an adjournment; but orders of adjournment are discretionary (*Bosley v. Wilson*, 12 *N. Y. Suppl.*, 45), and hence are not appealable to us on appeal from the city court (cases *supra*). Nevertheless, we have examined the papers on the motion for adjournment sufficiently to enable us to say, without hesitation, that in denying the motion the court committed no abuse of discretion. The application for postponement went upon the ground of the absence of an alleged material witness. But the witness had not been subpoenaed, nor had any effort been made to subpoena him or otherwise to procure his attendance. For this defect alone, the application was properly denied (*Brooklyn Oil Works v. Brown*, 7 *Abb. N. S.*, 382); but on reading the record we perceive that the adjournment might well have been refused also on the more substantial ground of justice.

The appeal from the order must be dismissed.

Appeals dismissed, with costs.

BOOKSTAVEN, P. J., and BISCHOFF, J., concurred.

Hegewisch v. Silver.

HEGEWISCH AS RECEIVER OF THE PROPERTY OF THE U. S.
ROLLING STOCK COMPANY, RESPONDENT, v. SILVER,
APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, DE-
CEMBER, 1892.

§ 999.

*New Trial—when may be granted upon minutes—motion to dismiss com-
plaint—upon what grounds considered to have been decided.*

A motion upon the minutes for a new trial may be made and granted in an action tried before a jury where the complaint was dismissed at the close of the plaintiff's case.

Where a motion to dismiss the complaint was made upon various grounds and denied, and then an additional ground for dismissal was stated and the motion to dismiss argued generally without any limitation and finally granted—*Held*, that the motion was not necessarily founded upon or limited to the last mentioned ground and, therefore, if any of the grounds stated were well taken, they were sufficient to justify the rule.

Where, in an action brought by the receiver of a corporation, there was no evidence that the plaintiff had ever filed a bond as receiver and no proof whatever of any attempt to comply with the requirements of the order appointing the receiver with respect to the filing of a bond which was a pre-requisite to his having any authority to assume the office of receiver by the very order appointing him, the plaintiff fails to make out a case and the complaint should be dismissed.

(Decided, December 16, 1892.)

Appeal by the defendant from an order of the circuit court in New York county granting a motion for a new trial made upon the minutes after the complaint had been

Hegewisch v. Silver.

dismissed at the close of the plaintiff's case on the ground that the plaintiff had not made out a case.

The facts are stated in the opinion.

J. H. McKewan (*Reade & McKewan*, attorneys) for defendant, appellant.

Charles Steele and *William D. Guthrie* (*Seward, Guthrie & Morawetz*, attorneys) for plaintiffs, respondent.

VAN BRUNT, P. J.—In consequence of the manner in which this case was tried and the appeal book came up, it is somewhat difficult to determine what questions are before the court upon this appeal; but we do not think there is any doubt as to the authority of the court to entertain the motion for a new trial, as it seems to be authorized by section 999 of the Code of Civil Procedure, upon the exceptions taken at the trial. That section provides that the judge presiding at a trial by a jury may, in his discretion, entertain a motion made upon his minutes at the same term to set aside a verdict or a direction dismissing the complaint, and granting a new trial upon exceptions. The granting of a new trial necessarily includes the setting aside of a verdict, if one has been rendered, or the setting aside of a direction dismissing the complaint, if that has been the result of the trial; and therefore the motion for new trial embraces all that the section authorizes. It is claimed, however, by the counsel for the respondent that the only question before this court is whether or not the court erred in dismissing the complaint upon the last ground specified by the counsel for the defendant at the close of the plaintiff's case. It is true that the record shows the various grounds for dismissal were stated, and that the ruling of the court then was that the motion be denied. The counsel then added

Hegewisch v. Silver.

an additional ground for dismissal, and it appears that the counsel for the plaintiff argued in opposition to the motion to dismiss generally, without any limitation, and the motion to dismiss was finally granted, and an exception taken by plaintiff. We cannot see from this record that the motion was necessarily founded upon or limited to the last-mentioned ground. The court evidently reconsidered its previous ruling, and decided to dismiss the complaint. Therefore any of the grounds stated, if well taken, were sufficient to justify the ruling.

This action was brought by a receiver appointed by the United States court. The order appointing the receiver provided, as a condition precedent of his taking and holding possession of the property of which he was appointed receiver, that he should file a bond. There was no evidence in the case whatever that the receiver, plaintiff, ever filed any bond; and that was one of the grounds for the dismissal. It was expressly held by the court of appeals in *Re Christian Jensen Co.* 128 (N. Y., 550), that a receiver cannot interfere with the property of which he is appointed receiver until after he has filed his bond. A large number of cases are cited for the purpose of showing that this failure of proof was not fatal to the plaintiff's right to recover; but in each of these cases it will appear upon examination that there was an attempt to comply with the law, but, because of some irregularity in the bond, it was claimed that no sufficient bond had been filed to comply with the law. In the case at bar there is no proof whatever of any attempt to comply with the requirements of the order appointing the receiver, in respect to the filing of a bond, which was a pre-requisite to his having any authority whatever to assume the office of receiver, by the very terms of the order appointing him.

Reference is made to some statement contained in the case in regard to what the plaintiff's counsel stated, upon the argument of this motion, had occurred during the

Dubal Watch-Case Mfg. Co. v. The Keystone, Etc.

trial, and what he understood and assumed at the trial; but this memorandum cannot be considered by the court, as it rightfully forms no part of the record. We are of opinion, therefore, that the plaintiff failed to make out a case, and that the court was right in dismissing the complaint, and that the order appealed from should be reversed, with costs.

O'BRIEN and BARRETT, JJ., concurred.

DUBAL WATCH-CASE MANUFACTURING CO.,
RESPONDENT v. THE KEYSTONE WATCH-CASE
COMPANY, IMPLEADED, ETC., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, DE-
CEMBER, 1892.

§ 531.

Bill of Particulars—affidavit of attorney on motion for, insufficient.

A motion for a bill of particulars should be denied where the affidavit upon which the motion is founded is made by the attorney of the moving party, notwithstanding his client is a foreign corporation, and all its officers are without the State, where that is the only reason given why the affidavit is made by the attorney.

The fact that a party moving for a bill of particulars is a foreign corporation does not affect or vary the ordinary rule requiring that upon such a motion an affidavit showing the necessity for the particulars, should be made by one of its officers.

(Decided December 16, 1892.)

Appeal by the defendant from an order of the New York County special term denying in part a motion by it for a bill of particulars of the plaintiff's claim.

Dubal Watch-Case Mfg. Co. v. The Keystone, Etc.

The facts appear in the opinion.

Leonard L. Wheeler (*Georgé Charlton Comstock*, attorney)
for defendants, appellant.

Wilbur & Ohleman, attorneys for plaintiff, respondent.

BARRETT, J.—The application for a bill of particulars of the plaintiff's claim was granted in part and denied in part. The defendant, the Keystone Watch-Case Company appeals upon the ground that the motion should have been granted in its entirety. We think, however, that the motion should have been denied in its entirety, for the reason that it was not founded upon an affidavit made by the defendant. The only affidavit upon which the motion was founded was that of the defendant's attorney, and it has been settled, by repeated adjudications, that such an affidavit is insufficient. The only reason given by the attorney why this affidavit is not made by his client is, that the defendant whom he represents is a foreign corporation, and all of its officers are without this state, and that he (the attorney) has charge of this action. The attorney cannot know that the defendant needs the particulars which it claims, or that it has not in its possession all the facts which it seeks to compel its adversary to disclose. The fact that the defendant is a foreign corporation does not affect or vary the ordinary rule which governs upon this subject, and there is no more reason why the affidavit upon which such a motion is based should not be made by its officers than by an individual defendant, or by the officers of a domestic corporation. As the plaintiff has not appealed from so much of the order as granted a motion for a bill of particulars in part, we can only affirm the order appealed from, with costs. Order appealed from accordingly affirmed, with costs and the usual disbursements.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

Griggs v. Guinn.

GRIGGS v. GUINN.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
NOVEMBER, 1892.

§§ 3256, 3956.

*Referee's fees—when stipulation as to, too indefinite—stenographer's fees
—when cannot be taxed.*

A stipulation fixing the fees of a referee at an amount other than that provided in the statute is ineffectual for that purpose unless it provides for a specific sum.

The amendment of § 3256 of the Code of Civil Procedure made by chapter 185 of the Laws of 1892, providing that stenographer's fees for minutes of testimony before a court judge or referee can be included in taxable costs, is repealed by the amendment of the same section contained in chapter 592 of the Laws of 1892.

Stenographer's fees for taking minutes of testimony upon a reference cannot be taxed where there is no stipulation with respect thereto, and counsel for the party against whom they are so taxed objects thereto.

(Decided, November 10, 1892.)

Motion to confirm report of a referee appointed to compute the damages sustained by the defendant by reason of a temporary injunction granted in this action.

Sufficient facts appear in the opinion.

Benjamin Estes for plaintiff.

Frederick W. Peabody for defendant.

GILDERSLEEVE, J.—The report of the referee herein should be modified as follows: First, by reducing counsel

Griggs v. Guinn.

fee on reference from seventy-five dollars to fifty dollars; second, the stipulation entered into in respect to referee's fees is too indefinite to be operative. No stipulation can suspend the operation of the statute, except it provides for a specific sum. *Griggs v. Day* (Super. N. Y.), 18 N. Y. Supp. 796; *Bank of Cooperstown v. Tamajo*, 77 N. Y., 476. The affidavit of the referee states that he spent twelve days in the business of the reference. The compensation fixed by the statute is six dollars per day, unless a different rate of compensation is fixed by consent or order. (*Code*, § 3296.) It therefore follows that the referee is entitled to seventy-two dollars. His fee must be reduced from one hundred and fifty dollars to seventy-two dollars.

By chapter 185 of the Laws of 1892, section 3256 of the Code of Civil Procedure was amended by providing that stenographer's fees for minutes of testimony before a court, judge, or referee could be included in the taxable costs; but this chapter of the Laws of 1892 is clearly abrogated by a subsequent chapter, to wit: chapter 592 of the Laws of 1892, which also amends section 3256 of the Code, but leaves out the provision for stenographer's fees, although it does not specifically repeal chapter 185 of the Laws of 1892. Hence I know of no authority that authorizes the stenographer's fees to be taxed as a disbursement in this proceeding against the opposition of counsel. The *Pfandler Barm Extracting Bunting Apparatus Co. v. Sargent*, 43 Hun, 154. It therefore follows that the sum reported by the referee as stenographer's fees must be disallowed. The aggregate damages sustained by the defendant must be held to be one hundred and seventy-two dollars. Thus modified, the report of the referee is confirmed.

Pittsfield National Bank v. Tailer.

PITTSFIELD NATIONAL BANK, RESPONDENT v. TAILER, IMPEADED, WITH BAYNE *et al.*, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, DECEMBER, 1892.

§§ 14, 1241, 1327, 2266, *et seq.*

Contempt—when failure to obey judgment is not—effect of appeal.

A defendant directed by a judgment to pay the plaintiff the amount of the judgment, with interest and costs, is not in contempt for failing to do so until after the service upon him of a certified copy of the judgment; service of a copy thereof upon his attorney is not sufficient to bring him in contempt, and the fact that he is aware of the judgment, and has appealed from it and recognized its existence in other ways, is entirely immaterial.

Pitt v. Davidson (37 N. Y., 235), distinguished.

Where a judgment directed a defendant to pay the plaintiff out of property in his hands the amount of the plaintiff's judgment, with interest and costs, or in case he does not do so within ten days after the service of a certified copy of the judgment upon him, then that he pay over to a receiver all such assets in his hands, and account therefor to such receiver, is not in contempt for failure to make such payment until the expiration of ten days after service upon him of a certified copy of the judgment.

While it seems a party may be punished for contempt in violating an order or judgment of which he has notice, he cannot be punished for failing to do something that he is commanded to do, except after the manner and upon the basis specified in the statute.

Where a judgment in an action brought to set aside a general assignment, adjudged and directed the assignee to pay to the plaintiff out of the assigned property in his hands the amount of the plaintiff's judgment, with interest and costs, or if he does not do so within ten days after the service of a certified copy of the judgment upon him, then to deliver such assets to a receiver of

Pittsfield National Bank v. Tailer.

the assignor's property, and account therefor to him, and that the receiver thereupon sell the property, and out of the proceeds pay the plaintiff's judgment, with interest and costs,—*Held*, That the judgment could have been enforced by execution; that the money judgment was the foundation of what followed, and in effect the substantial judgment in the action, and the direction in case of non-payment to turn over the property to a receiver was but an aid to the enforcement of such money judgment; that an undertaking given by the defendant to stay proceedings upon that part of the judgment which directed that payment of the money, also stayed proceedings upon the part of the judgment directing the payment of the judgment to a receiver, and was a complete answer to a motion to punish the defendant for contempt in failing to obey said direction.

(Decided, December 16, 1892.)

Appeal by defendant, Tailer, from an order of the New York County special term adjudging him in contempt.

This action was brought by the plaintiff against the defendants William H. Bayne, Bushrod R. Bayne and Eliza J. Campbell, who had previously been co-partners carrying on business under the firm name and style of Ross, Campbell & Co., and against the defendant Tailer, to whom the other three defendants had made a general assignment for the benefit of their creditors. The relief sought in the action was the setting aside of the assignment on the ground that it was fraudulent and void. The case was tried at special term, and resulted in a judgment declaring the judgment fraudulent and setting it aside, and directing the defendant Tailer to pay out of the assets and property of the assignors in his hands the amount of the plaintiff's judgment, with interest and costs; or, in case he failed to do so within ten days after the service of a certified copy of the judgment entered upon said decision, then that he pay over to a receiver all the property of Ross, Campbell & Co. in his hands, and that he account therefor to such receiver, and that the receiver thereupon sell the property, and out of its proceeds pay

Pittsfield National Bank v. Tailer.

the plaintiff the amount of his judgment, with interest and costs.

The defendants duly appealed from said judgment to the general term of the supreme court in New York County, and gave the usual undertaking to stay proceedings pending an appeal.

The judgment was affirmed by the general term in June, 1892 (see 19 *N. Y. Supp.* 937), and the defendants thereupon took an appeal therefrom to the Court of Appeals, again giving an undertaking to stay proceedings; that appeal was pending at the time of the making of the motion which resulted in the order now appealed from.

Edward B. Whitney (Burnett & Whitney, attorneys),
for defendant, Tailer, appellant.

John J. Adams, for plaintiff, respondent.

Franklin Bein, for receiver, respondent.

BARRETT, J.—Two objections are made to the order appealed from. The first is that a certified copy of the judgment was not served upon Mr. Tailer; the second, that the undertaking, which was given upon appeal to the court of appeals, stayed proceedings upon that part of the judgment which directed Mr. Tailer to pay, out of the property of his assignors in his hands, a specified sum of money.

The judgment here is somewhat unusual. It first adjudges the general assignment made by the firm of Ross, Campbell & Co. to be fraudulent and void, and then directs the assignee (Tailer) to pay to the plaintiff, out of the property and assets of the firm in his hands, the amount of the plaintiff's judgment, with interest and costs. This part of the judgment is unconditional and final, and is complete in itself. But a further provision follows, namely, that, in case Tailer "does not make such payment within ten days after the service upon him of a certified copy of this decree," then he shall pay over to a

Pittsfield National Bank v. Tailer.

receiver all the property and assets of the firm of Ross, Campbell & Co. in his hands; that he account therefor to such receiver; and that the receiver thereupon sell said property, and out of the proceeds of sale pay to the plaintiff the amount of his judgment, interest, and costs. Upon this state of facts, it was a complete answer to the plaintiff's motion that the judgment had not been personally served upon Mr. Tailer.

He could not be in contempt until the expiration of 10 days after serving upon him of a certified copy of the judgment. Such was the tenor of the judgment itself. But, even if no provision in that respect had been made therein, it could only be enforced by punishment for contempt in case Mr. Tailer refused to obey its commands after service upon him "of a certified copy thereof." (*Code Civ. Pro.*, § 1241). Service upon a party's attorney is not sufficient to bring him into contempt. The well-known case of *Pitt v. Davison* (37 *N. Y.* 235), is cited in support of the opposite doctrine, but that case merely holds that the papers upon a motion to punish for a civil contempt may, when so directed by the court, be served upon the attorney for the party who is proceeded against, the motion being a proceeding in the action. There is a clear distinction between the act which constitutes the contempt and the proceeding to punish therefor. The attorney cannot bring about his client's guilt, although the remedy, when the offense has been committed, may, by judicial direction, be enforced in the ordinary way. The contempt itself, however, can only be predicated of the client's own act; that is, of his refusal or neglect to obey the judgment after personal service of a certified copy thereof upon him, as required by law.

The fact that a party is aware of the judgment, that he has appealed from it, that he has recognized its existence in other ways, is entirely immaterial. A party may doubtless be punished for violating an order or judgment of which he has notice, but he cannot be punished

Pittsfield National Bank v. Tailer.

for failure to do something which he is commanded to do, except in the manner and upon the condition specified in the statute.

The second objection is equally fatal. The undertaking given by the appellant stayed proceedings upon that part of the judgment which directed the payment of money. It is well settled that the judgment in this respect could have been enforced by execution, none the less because the defendant is required to pay the amount out of the property and assets in his hands. (*Randall v. Dusenbury*, 51 *How. Pr.* 367; affirmed 41 *N. Y. Super. Ct.* 456; *In re Hess*, 48 *Hum*, 586; *Fassett v. Tallmadge*, 14 *Abb. Pr.* 188. And see *Myers v. Becker*, 95 *N. Y.* 486, where *Randall v. Dusenbury* is cited; and *Ross v. Butler*, 19 *N. Y. Civ. Pro.*, 152.)

The money judgment is here the foundation of what follows. It is, in effect, the substantial judgment in the action, and the direction, in case of nonpayment, to turn over the property to a receiver, is but an aid to the enforcement of such money judgment. So long, then, as the enforcement of the judgment directing payment of a specific sum of money is stayed, a compliance with the subsequent provision in aid of such judgment cannot well be exacted; otherwise, the plaintiff would be permitted to go on and collect, through the receiver, the very judgment as to which he is stayed.

The order appealed from should therefore be reversed, with \$10 costs and disbursements, payable by the plaintiff, but not by the receiver; and the motion to punish for contempt denied, with \$10 costs.

VAN BRUNT, P. J. (concurring).—Without in any way conceding the power of the court to enforce obedience to the money judgment by proceedings for contempt, I concur.

O'BRIEN, c. c., concurred.

Allen v. Murray.

PEOPLE *ex rel.* ALLEN v. MURRAY, JUSTICE OF THE DISTRICT COURT IN THE CITY OF NEW YORK, FOR THE ELEVENTH JUDICIAL DISTRICT.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
OCTOBER, 1892.

§ 545.

Scandalous matter when stricken from affidavits by court of its own motion.

An allegation in a pleading or in an affidavit of anything which is unbecoming the dignity of the court to hear or which is contrary to good manners, or which charges crimes not necessary to be shown in the cause, is regarded as scandalous and will be stricken out; if matter is scandalous it is also impertinent.

Affidavits and other papers for use upon a motion which are scandalous or contains scandalous statements, may be suppressed by the court or stricken out of the papers and not allowed to be used, and this the court may do on its own motion without an application from the adverse party.

(Decided, October, 1892.)

Action by the court upon its own motion striking out of the papers upon which a mandamus was applied for, scandalous matter contained therein.

Sufficient facts appear in the opinion.

William H. Secor, for appellant.

Allen Murray, for respondent.

Allen v. Murray.

McADAM, J.—The rule is that an allegation in a pleading or in affidavits of anything which is unbecoming the dignity of the court to hear, or which is contrary to good manners, or which charges crime not necessary to be shown in the cause, is regarded as scandalous and will be stricken out (1 *Daniel Ch. Pl.*, § 347; *Story's Eq. Pl.*, §§ 266–862). If matter is scandalous, it is also impertinent. Scandal tends to injure by making records the means of perpetuating libelous and malignant slanders (1 *Story's Eq. Pl.*, §§ 269–270). In *scandalum magnatum*, words spoken in derogation of a peer, judge, or other high officer of the realm, was formerly more reprehensible than defamation of a private person, and much greater is the misconduct when put in writing in the form of a court record to be treasured and preserved for all time to come. The objectionable matter in this instance reflects upon the official integrity of the respondent, and is calculated to bring him into disrepute as a judicial officer. The scandalous matter appears in the affidavit of Mr. Secor, the relator's attorney; is wholly irrelevant to the legal questions presented, and not entitled to a place upon the record. The attorney ought to have known this, and must be censured for his unprofessional conduct. In chancery practice, when a bill or other pleading contained scandal, it was referred to a master to be expunged; and till this had been done the opposite party was not required to answer (3 *Bl. Com.*, 442). The rule is now more summary. Affidavits and other papers for use on a motion, which are scandalous or contain scandalous statements, may be suppressed by the court or stricken out of the papers and not allowed to be used. The court will do this and should do so of its own motion, without an application from the adverse party (*People v. A. & S. R. R. Co.*, 49 *How. Pr.*, 39; s. c., 8 *Abb. Pr. N. S.*, 122; *People v. Church*, 2 *Lans.*, 259, 57 *Barb.*, 204). Section 545 of the Code is merely declaratory of the common law upon the subject (See 5 *Sandf.*, 637; 5 *How. Pr.*, 53; 17 *Abb. Pr.*, 188; 44 *Barb.*, 64;

Allen v. Murray.

18 *Abb. Pr.*, 375 ; 8 *Hun*, 522). The court, of its own motion, has stricken out the scandalous matter referred to, with the admonition now given, that the practice of libeling suitors by impertinent and irrelevant language in affidavits or otherwise will not bear repetition in this or any other court of justice. Indeed, had the court known that the papers contained such matter, it would have declined to receive them for judicial action. The dignity of the court, professional ethics, good practice, and the orderly administration of justice require the rebuke administered. Warren, in his work on attorneys, speaking of the respect due to the feelings of others, reminds practitioners of the trite but beautiful verse :

“ Teach me to feel another's woe,
To hide the fault I see :
The mercy I to others show,
That mercy show to me.”

If errors are to be redressed by corrective measures by a court of review, it can be aided by intelligent legal argument—never by scandal in any form, or to any extent. If the application to expunge had been made on the application of the respondent, the court would have allowed costs against the attorney personally, under § 545 of the Code. As no such motion was made, no costs will be granted. This opinion is filed in explanation of the red ink lines which appear in the affidavit, striking out the offensive and irrelevant matter aforesaid, and to aid in preventing a repetition of misconduct which has no place in the halls of justice.

Zivi v. Nelke.

ZIVI, RESPONDENT, v. NELKE, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1893.

§§ 538, 1294.

Denials in answer—when not stricken out as sham—Appeal from judgment by default—Procedure where order striking out answer reversed.

A judgment of the general term of the city court of New York, affirming a judgment taken by default for want of an answer, is not appealable to the court of common pleas.

Keller v. Feldman (*Ante* p. 37), followed.

Where an answer was stricken out as sham at a special term of the city court of New York, and judgment entered as by default for want of an answer, an appeal does not lie to the court of common pleas from a judgment of the general term of the city court affirming said judgment, but the court of common pleas has unquestionable jurisdiction to review an order of such general term affirming the order, striking out the answer, and if it finds the order erroneous, it will be the duty of the court below to reinstate the answer, and try the case on the issues raised.

In an action against stockholders of a full liability business corporation, to recover a debt owing by the corporation for money loaned it, upon which judgment has been recovered against the corporation, an answer denying knowledge or information sufficient to form a belief as to the existence of the indebtedness, and the recovery of the judgment is sufficient.

Ketchum v. Zerega (1 *E. D. Smith*, 553), distinguished.
(*Decided January*, 1893.)

Appeal from order of the general term of the city court of New York affirming order of the special term striking out answers as sham, and from a judgment of the

Zivi v. Nelke.

said general term affirming a judgment entered on the order so striking out the answers.

The action was brought to recover from a stockholder of a business corporation organized under the laws of 1875, a debt owing as the complaint alleged by the corporation upon which judgment had been recovered by the plaintiff against the corporation. The answers denied knowledge or information sufficient to form a belief as to certain allegations of the complaint. Other facts appear in the opinion.

B. F. Einstein for defendants, appellants.

James Murphy, for plaintiffs, respondent.

PRYOR, J.—The judgment being by default, for want of an answer, is not appealable to this court (*Keller v. Feldman*, herewith decided, *Ante* p. 37).

But the appellants are not remediless. We have unquestionable jurisdiction to review the order affirming the order striking out the answers; and, should we find error in the decision complained of, it will be the duty of the court below to reinstate the answers and try the case on the issues raised.

The action proceeds upon section 34 of the act of 1875, chapter 611,* and is prosecuted to enforce against the defendants, as stockholders, a debt or liability of the Rubolio Company, evidenced by a judgment. It is equivocal on the face of the complaint whether it counts upon the original liability or the judgment; but take the case in either aspect, and it is sufficiently apparent

* This provision makes stockholders of an unlimited business corporation organized under the laws of 1875 liable for its debts, after judgment thereon against the corporation and the return unsatisfied of an execution against its property.

Zivi v. Nelke.

that the answers controverted material allegations of the complaint.

If the action proceeds upon the original indebtedness of the company, then the answers traverse in due form (*Code Civ. Pro.* § 500) the alleged loan to the company and its present liability therefor—both of which facts it is incumbent on the plaintiff to establish. If the action be upon the judgment, then the answers traverse the judgment, and the company's subsisting liability on it—both of which facts it is incumbent on the plaintiff to prove. It is manifest, without more, that the court below had no authority to strike out the answers (*The Robert Gere B'k v. Inman*, 51 *Hun*, 97, opinion of FOLLETT, J., collecting all the cases).

It is argued, however, that the action being on the judgment, the defendants are presumed to be cognizant of it; and for support of the proposition our own decision in *Ketcham v. Zerega** is cited with apparent confidence. But there the judgment was against the party himself, whereas here the judgment is against a stranger (*Miller v. White*, 50 *N. Y.*, 141). Again, it is urged that the existence of the judgment is not an issue of fact; but in this State the plea of *nul tiel record* is triable by the jury (*Fasnacht v. Stehn*, 53 *Barb.* 950).

But, should there be a judgment in form against the Rubolic Company, the defendants may impeach it for defect of jurisdiction; and yet again, should the judgment exist and be valid, the answers impose upon plaintiff the obligation to prove it still unsatisfied.

Hence, as the answers, by denial, put in issue essential allegations of the complaint, they cannot be stricken out as sham (*Robert Gere B'k v. Inman*, *supra*).

The argument at the bar ranged over a variety of interesting topics; but, indisposed to anticipate the course of the trial, we are content to adjudicate simply the question before us.

*1 *E. D. Smith*, 653.

Martin v. Raffin.

Order reversed. Appeal from judgment dismissed. No costs to either party. Trial directed on the answers stricken out, or any amended answers that may be interposed by leave of the court below.

Order to be settled on notice.

BOOKSTAVEN, P. J., and BISCHOFF, JR., J., concurred.

MARTIN, APPELLANT v. RAFFIN, RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM, FEBRUARY, 1893.

§§ 425, 426.

Summons—when service of, not set aside.

Where the summons in an action was served upon the defendant who sought to avoid the service thereof, by laying the same upon his shoulder without the use of any violence or force or without the show of violence or force, such service will not be set aside on the ground that it involved an assault upon the defendant's person.

Instance of a case in which service of a summons was not effected by trick.

(Decided February, 1893.)

Appeal by the plaintiff from an order of the special term setting aside the service of a summons herein and vacating and setting aside the summons itself.

The facts appear in the opinion.

Fred'k K. Clark, for plaintiff, appellant.

Stickney, Spencer & Ordway, for defendant, respondent.

Martin v. Raffin.

FITZSIMONS, J.—This is an appeal from an order vacating and setting aside the summons herein and the service thereof upon defendant.

The defendant resides in Tremont. The process server called there twice to serve him with the summons herein and some other papers. On his second visit he found the defendant actually in the shelter of his wife's petticoats, he having sought that means of protection for the purpose of avoiding service of the summons herein. While in that position he was invited to accept service of said summons, which he refused to do. The summons and other legal papers were then laid upon his shoulder and he shook them to the floor.

The appeal is based upon two points :

I. That the service as above described involved an assault upon the defendant's person.

II. That it was effected by a trick, viz., concealing the process among a number of other papers entitled in another action or proceeding.

I cannot imagine how the service in question involved an assault upon defendant. Even the defendant swears that the papers served upon him were laid upon his shoulder. No violence or force, or even show of violence or force, was used to accomplish the service. He refused to receive them in his hand, and therefore in my opinion the manner of service adopted was the only other way left to make service, and was certainly justifiable. In fact, the entire conduct of defendant was disrespectful to, and exhibited a contempt for, courts and legal process, which should not be encouraged by setting aside the service of the summons herein. In fact, his conduct was so reprehensible that it would please me to punish him for contempt, if possible. To say that a person may avoid service of legal papers by refusing to accept the same, is to degrade the law and courts in the eyes of a person like defendant.

As to the second point, that the service was effected

Ward v. Ward.

by a trick, the mere recital of the means of service herein is sufficient refutation of that claim. No trick was used, and the summons might easily have been seen and read by defendant if he chose to do so. It was not concealed among the other papers served upon defendant at the time of the service of said summons.

The service herein under the circumstances related was proper.

The order appealed from is reversed, with costs, with leave to defendant to appear within three days after service of order entered hereon upon defendant's attorneys.

MCGOUN and VAN WYCK, JJ., concurred.

WARD v. WARD.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
NOVEMBER, 1892.

§§ 3251, 3256.

Costs of motion—by whom adjusted—disbursements to be allowed.

The provision of the statute relating to the taxing of costs by a clerk of a court does not apply to a motion, and where costs and disbursements are given by a court or a judge on a motion, they must be specifically expressed in the order as entered, and while the order may direct the clerk to tax the disbursements so awarded, it must then contain a specific delegation to the clerk of the power to tax the amount of the disbursements allowed.

Upon a motion for counsel fee and alimony in an action for divorce, the court or judge may allow as costs a sum not exceeding \$10, and may also allow necessary disbursements for printing and referee's fees, but cannot allow stenographer's fees.

(Decided, November 17, 1892.)

Motion for new taxation of costs.

Ward v. Ward.

The facts appear in the opinion.

FREEDMAN, J.—The questions involved arise (1) upon an appeal from the taxation by the clerk of certain disbursements incurred upon a reference; (2) upon defendant's motion, founded upon affidavit for a retaxation; and (3) upon the referee's motion, founded upon affidavit for a retaxation. The action is by wife against husband, for a separation and for support. The wife moved for alimony during the pendency of the action, and a counsel fee; and, upon the hearing of the motion, such a conflict seems to have been created by the attorneys for the parties that the court felt bound to order, and did order, a reference. The referee was directed to determine whether any, and, if so, what alimony and counsel fee ought to be awarded to the plaintiff. The reference terminated in a report, upon the confirmation of which an order was entered, granting to the plaintiff alimony at the rate of \$50 per month, and an allowance of \$250, as and for expense in conducting this action, and together with such a sum as shall be taxed by the clerk of this court as costs and disbursements in this proceeding. Under this provision of the order, the attorney for the plaintiff presented to the clerk for taxation a bill of disbursements amounting to \$602.65, of which \$375 were for referee's fees and \$221.65 for stenographer's fees.

The conduct of the attorneys for the respective parties, which works such extravagant expenditure on a mere motion, the object of which is simply to provide a provisional support to the wife during the pendency of an action which can and ought to be terminated in a few months, calls for condemnation on the part of the court. True, the main fault lies in the system which sanctions such a practice. But attorneys should have due regard to the ultimate interests of their clients: and, if they seem oblivious of their duty in this respect, a referee of sufficient self-respect should remind them of it. A small

Ward v. Ward.

fortune should not be frittered away upon such a preliminary point. Entertaining these views, I shall hold every participant in the reference to strict practice. It appears that the clerk, from the proofs submitted to him, reduced the item of \$375 for referee's fees to \$210, and that he reduced the item of \$221.65 for stenographer's fees to 117.30. Both the defendant and the referee complain of this ruling: the defendant contending that no referee's or stenographer's fees should have been allowed, and the referee, appearing by private counsel, contending that his fees should have been taxed at the sum of \$350. The stenographer, at some time or other, also appeared by separate and private counsel, and submitted affidavits, but whether they were before the clerk does not clearly appear. Upon the case as submitted to me a great conflict exists as to what was before the clerk, and also as to what was the real agreement between the parties and the stenographer; and, if it were necessary to determine the said conflict, much time and labor would have to be spent to arrive at the truth. I do not deem it necessary, however, to make such determination, because I have satisfied myself that, under the order referred to, the clerk had no power to tax referee's or stenographer's fees. My reasons are as follows: The clerk is made, by statute, the taxing officer, for the purpose of taxing the costs and disbursements of the action preparatory to the entry of final judgment. His duties as such taxing officer are prescribed by statute, and everything he may do is regulated by statute. But these statutory provisions do not apply to a motion. If costs and disbursements are given by the court or a judge on a motion, they must be specifically expressed in the order as entered. True, the order may refer it to the clerk to tax the disbursements so awarded, but then the order must contain a specific delegation of power to the clerk to tax the amount of the particular disbursements allowed. The costs and disbursements which may be given upon a motion for ali-

Ward v. Ward.

mony and counsel fees are regulated by section 3251, Code Civil Procedure. It is there provided that upon such a motion a sum fixed by the court or judge, not exceeding \$10, may be awarded as costs, besides necessary disbursements for printing and referee's fees. This seems to exclude stenographer's fees. Section 3256, on the other hand, contemplates only the costs of the action, and does not apply to motions; and consequently the amendments of 1892 are immaterial, no matter what they may amount to on the taxation of the costs of the action. The consequence of all this is that if, in the present case, stenographer's fees, as well as referee's fees, can be allowed, they must be specifically named in the order, and if the clerk is to tax them, he must be specifically directed to do so. In the case at bar the order, as entered, shows upon its face that the judge who directed it to be entered struck out the specific direction to the clerk, originally inserted therein, to tax the referee's and stenographer's fees. This is quite significant. Moreover, the order allows to the plaintiff the "sum of two hundred and fifty dollars, as and for expense in conducting this action." As the main expense in conducting this action, so far, has been the expense of the reference, this might, in a certain aspect, be construed as an allowance on that account. From all this it follows that the additional words, "together with such a sum as shall be taxed by the clerk of this court as costs and disbursements in this proceeding," are too indefinite and uncertain to constitute a specific delegation of power to the clerk to tax referee's or stenographer's fees.

For the reasons stated, the taxation must be set aside, so far as it allows any sum whatever for referee's fees or stenographer's fees, and the referee's motion for a re-taxation denied.

Cassidy v. McFarland.

CASSIDY *et al.*, RESPONDENT, *v.* McFARLAND *et al.*,
WOOD, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1893.

§§ 3251, 3256.

Costs—adjustment of, allowed on appeal from order—disbursements.

Where an order of the general term affirming an order of the special term, with costs, ten dollars costs, together with proper disbursements can be taxed; although the costs of a motion must be taxed by a court or judge, there is no provision that the costs allowed upon an appeal should be so taxed; and as the usual costs of a motion are \$10, and motion costs only can be allowed upon such appeal, it is assumed that that sum is intended, by an affirmance with costs, but specifying no amount.

While *it seems* that disbursements of a motion can be only taxed by a clerk where the order expressly directs it to be done, such is not the practice upon an appeal from an order, and where disbursements follow the allowance of costs by the general term, and they must be taxed, the authority of the clerk to tax them is from the necessity of the case presumed from the order allowing costs.

Disbursements on appeal from an order are not limited to disbursements for printing.

(Decided, January 11, 1893.)

Appeal by the defendant, Wood, from an order of the special term, denying a motion for a new taxation of costs.

The defendant, Wood, appealed to the general term of this court from an order of reference, and the order was affirmed, with costs, and an order to that effect duly entered, which did not specify the amount of such costs.

VOL. XXIII.—5.

Cassidy v. McFarland.

The plaintiff, who was respondent in such appeal, thereupon presented a bill of costs to the clerk of this court for taxation, in which were included \$10 costs of appeal and disbursements amounting to \$9.06. The taxation of the costs was opposed by the defendant, Wood, on the ground that the order of the general term did not authorize or empower the clerk of this court to tax any disbursements or costs, or to fix the amount of costs at \$10, or any other sum, and also that no disbursements could be taxed on the motion except disbursements for printing.

The clerk overruled the objection, and taxed the costs as desired by plaintiff, and the defendant, Wood, thereupon moved for a new taxation of costs, and his motion being denied by the special term, took this appeal.

George A. Stearns, for the defendant, Wood, appellant.

Thomas C. Ennever, for plaintiffs, respondent.

DALY, C. J.—The order of the general term affirmed the order of reference, "with costs." It has been held that \$10 costs, together with disbursements, can be taxed under such an order. *Jones v. Sherman*, 8 *N. Y. St. Rep.*, 344. The Code provides that costs of motion shall be a sum fixed by the court or judge, not exceeding \$10. Section 3251. But there is no provision requiring that the costs allowed upon an appeal for an order made upon a motion shall be fixed at a certain sum by the appellate court. It is settled that motion costs ordered, only, can be allowed upon such an appeal (*Phipps v. Carman*, 26 *Hun*, 518); and, as the usual costs of motion are \$10, it is to be assumed that that sum is intended by an order affirming, "with costs," but specifying no amount.

By section 3256, it is provided that, where an allowance of costs is made in an action, the party is entitled to

Kelly v. New York Central and H. R. R. Co.

his necessary disbursements. It has been held that disbursements of a motion may be taxed by the clerk only where the order expressly directs it to be done. *Ward v. Ward* (*Ante*, p. 61). That decision prescribed the practice upon a motion, but not upon an appeal from an order. It is nowhere required that the general term shall tax the disbursements of the successful party; and where disbursements follow the allowance of costs by the general term, and must be taxed, the authority of the clerk to tax them is, from the necessity of the case, presumed from the order allowing costs.

The last objection made is that only disbursements for printing can be allowed upon a motion (*Code Civ. Pro.*, § 3251). There is no such restriction upon an appeal from an order.

Order appealed from affirmed, with costs.

BOOKSTAVEN and PRYOR, JJ., concurred.

KELLY, APPELLANT, v. NEW YORK CENTRAL AND
HUDSON RIVER R. R. CO., RESPONDENT.

SUPREME COURT, THIRD DEPARTMENT, GENERAL TERM, DE-
CEMBER, 1892.

§§ 870 *et seq.*

Examination of party before trial—when proper.

A party to an action is entitled, as a matter of right, to an order for the examination of his adverse party before trial, unless the justice to whom application therefor is made determines that the evidence sought is immaterial or unnecessary, or that the examination sought was merely for the purpose of annoyance or delay.

Kelly v. New York Central and H. R. R. Co.

Herbage v. City of Utica (14 *N. Y. Civ. Pro.*, 79), followed.

A party litigant may, in the discretion of the judge or justice to whom application is made, upon complying with the provisions of the Code of Civil Procedure, have a general examination of his adversary as a witness in the case, as well before as at the trial, and such examination is not limited to an affirmative cause of action or an affirmative defence. The discretion of the court is to be exercised on the line indicated in the case of *Water v. Wilcox* (post p. 69, note), viz.: in determining whether the testimony sought is material and necessary, and where it has exercised his discretion, its decision will not be reversed on appeal, unless it very clearly appears to be erroneous.

(Decided, December, 1892.)

Appeal by plaintiff from an order of the St. Lawrence County special term denying a motion made by him to vacate an order obtained by the defendant for his examination as a party before trial.

The opinion states sufficient facts.

C. A. Kellogg, for plaintiff, appellant.

Thomas Spratt, for defendant, respondent.

HERRICK, J.—It seems to me that the affidavits upon which the order for an examination was granted embody all the requirements of sections 872 and 873 of the Code of Civil Procedure, and unless, in the exercise of his discretion, the justice to whom the affidavits were presented determined that the evidence sought was immaterial or unnecessary, or that the examination sought was merely for the purpose of annoyance or delay, the defendant was entitled to the order as a matter of right. *Watts v. Wilcox*, 17 *N. Y. Supp.* 647; affirmed in 133 *N. Y.* 672.* A

**Watts v. Wilcox*, was affirmed by the court of appeals on the decision of the general term of the supreme court, of which the following is a report :

Kelly v. New York Central and H. R. R. Co.

WATTS, RESPONDENTS, v. WILCOX, *et al.*, APPELLANTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM, FEBRUARY,
1893.

§ 870, *et seq.*

Examination of party before trial—when properly ordered.

Where the affidavit upon which an order for the examination of a party before trial is applied for, complies with all the requirements of the Code of Civil Procedure, the judge to whom it is presented is obliged to make an order for the examination, and the party applying for it can insist upon his doing so as a matter of right. The justice is not, however, deprived of all discretion, but he may examine the papers to see whether the testimony sought is material and necessary, and if he can see that it is immaterial and unnecessary or improper, or that the examination is desired merely for annoyance or delay, he may deny the application.

The fact that a party sought to be examined before trial has been previously examined at length in supplementary proceedings, is no reason justifying the vacation of the order for his examination, since the two examinations are for different purposes and on different lines.

(Decided, February 8, 1892.)

Appeal by defendants from an order of the Orange county, special term, denying a motion to vacate an order for their examination before trial.

The action was brought by the plaintiff as receiver of the property of Horatio R. Wilcox, a judgment debtor, to set aside transfers of property made by him and judgments used to effectuate those transfers, on the ground that they were a part of a fraudulent scheme whereby the judgment debtor was to strip himself of his property to avoid paying his debts.

The plaintiff obtained an order for the examination of the defendants as parties before trial, and the defendants moved to vacate it. Thereupon the order was made from which this appeal was taken.

Bacon & Merriitt, Lewis E. Carr, and Adams, Wilcox & Macklin,
for defendants, appellants.

Kelly v. New York Central and H. R. R. Co.

W. F. O'Neill, for plaintiff, respondent.

DEYMAN, J.—This is an appeal from an order denying a motion to vacate an order for the examination of some of the defendants in this action before the trial thereof. The affidavit upon which the order for the examination was based is full, and complies with all the requirements of section 872 of the Code of Civil Procedure; and section 873 says, at its commencement, "the judge to whom such an affidavit is presented must grant an order for the examination, if an action is pending," as it was in this case. Therefore, when the affidavit was presented to the judge, he was obliged to make the order, and the plaintiff could insist upon his doing so, as a matter of right. *Webster v. Stockwell*, 3 Abb. N. C. 115.

We do not intend to hold that the judge to whom an affidavit is presented is deprived of all discretion. He may examine the paper to ascertain whether the testimony sought is material and necessary; and, if he can see that it is immaterial and unnecessary or improper, or that the examination is desired merely for annoyance or delay, he may deny the application. *Jenkins v. Putnam*, 106 N. Y. 272.

The order for the examination was properly made in the first instance, and the power of the judge to issue the same was properly exercised; and the motion for its vacation was based upon an affidavit designed to show that the examination of the defendants was unnecessary because they had all been previously examined in proceedings supplementary to execution; that such examination was full, and the statements made therein were extant, and available to the plaintiff. We think the reasons assigned are insufficient to require or justify the vacation of the order.

There is a wide difference between an examination in supplementary proceedings and the examination of a witness for the procurement of testimony to be used and read upon the trial of an action, and they proceed upon entirely different lines. The one is for the discovery of property, and the other is for the discovery of evidence. The examination under this order will be conducted for the purpose of eliciting testimony relevant to the issues involved in this action, which can be read in evidence upon the trial, whereas the former examination was made with no such view, and can be made available only as admissions against the party examined. In no view can the former depositions of these parties be considered as the equivalent of the testimony which the plaintiff is entitled to elicit under the order for their examination in this action.

The order should be affirmed, with \$10 costs and disbursements.

PRATT, J., concurred.

 Allen v. Murray.

party litigant may, in the discretion of the judge or justice to whom application is made, upon complying with the provision of sections 870, 872 and 873 of the Code of Civil Procedure, have a general examination of his adversary as a witness in the case, as well before as at the trial; and such examination is not limited to an affirmative cause of action or an affirmative defence. *Herbage v. City of Utica* (14 *N. Y. Civ. Pro.*, 79). This case somewhat modifies the law as held in some former cases, and is understood by many of the profession. That discretion is to be exercised on the line indicated in *Watts v. Wilcox*, *supra*; and while this court has a right to review such exercise of discretion by the justice, it will not reverse his decision unless it appears very clearly to the court that error has been committed. In this case I cannot see that any such error has been committed. The order should be affirmed, with \$10 costs, and printing and other disbursements.

MAYHAM, P. J., and PUTNAM, J., concurred.

PEOPLE *ex rel.* ALLEN *v.* MURRAY, JUSTICE OF THE
DISTRICT COURT IN THE CITY OF NEW YORK FOR THE
ELEVENTH JUDICIAL DISTRICT.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM, OCTOBER, 1892.

§§ 2067 *et seq.*, 2248, 2249, 2251.

District Court in city of New York—right of justice to demand evidence of attorney's authority—Summary proceedings—when justice must sign final order and issue warrant—Mandamus—when granted to compel justice to sign final order and issue warrant in summary proceedings.

In a summary proceeding to recover possession of real property, brought in a district court in the city of New York, the justice

Allen v. Murray.

presiding thereat has no power to call upon an attorney of the supreme court who appears for the landlord to produce his special authority to so appear; his office confers that right, and the tenant not questioning it, the justice is not called upon to dispute it. [6]

It seems, in courts of record the authority of an attorney to appear for a person for whom he does appear, will be presumed. [1] Attorneys at law are recognized as officers of district courts in the city of New York by force of express statute [4], and it is not only a misdemeanor to practice in those courts without being admitted to the bar, but all the rules and regulations of the supreme court, and made applicable thereto so far as the same can be made applicable. [5]

It seems, in justice's courts there are no attorneys within the professional meaning of that term. [2] The reason of the rule stated. [2, 3]

A mandamus may issue commanding an inferior tribunal to act and proceed to judgment, but it will not prescribe what judgment to give; [7] the mandate is, that an officer proceed, adjudicate and exercise his judgment upon a question of law and fact involved, leave whatever error may be committed to be corrected after the decision is filed. [7]

Where an inferior court has erroneously decided some question of law or facts presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, and there is no other remedy, mandamus will lie to compel it to proceed. [8]

People v. Mayor (10 *Wend.* 393), followed. [9]

The office and extent of a writ of mandamus is to require the persons to whom it is directed to do some particular thing which appertains to their office and duty, and which the court issuing it supposes to be consonant with right and justice, and if the party making an application has a legal right, and no other specific remedy, the writ generally issues [10], but the party aggrieved is bound to show as the foundation of the proceeding that the specific acts sought to be coerced is the duty of the person against whom the writ is directed, and that such person has no discretion as to its exercise. [11]

People v. Supervisors (12 *Johns.* 415) followed. [10]

The word "sufficient cause," in § 2249 of the Code of Civil Procedure, providing that "if sufficient cause is not shown upon the return day of a precept" issued in summary proceedings, "the justice must make a final order awarding to the petitioner the delivery of the possession of the property," means some legal

Allen v. Murray.

reason why the order should not be made, such as the filing of an answer, creates an issue, or the discovery of objections fatal to the jurisdiction of the magistrate; and where no such impediment exists, the statute is mandatory that the justice must make a final order, and he has no discretion concerning it. [12]

While a justice before whom a precept in summary proceedings is returned has the right to take as much time as is needed to examine the papers to determine whether they follow statutory requirements, he has no power to unreasonably delay the proceeding, nor has he authority to adjourn it on his own motion without the filing of an answer or the consent of parties, [13] and where on his own motion he adjourned such a proceeding, and on the return day the parties not appearing endorsed upon the precept the word "dismissed," his acts are *coram non jure*, and void, and the matter must be treated as though no such proceedings had followed. [14]

The statute relating to summary proceedings, as its title indicates, intends the proceeding to be summary, short, sharp, decisive, and the legislative intent must be respected. [16]

Where, upon the return day named in a precept issued in summary proceedings to dispossess a tenant of real property for nonpayment of rent, the landlord appeared by an attorney of the supreme court, and the justice, of his own motion and without any question with respect thereto having been raised by the tenant, called upon the attorney to produce his authority to appear, and upon his failure to do so, adjourned the proceeding, and on the adjourned day, the landlord not appearing, endorsed upon the precept the word "dismissed"—*Held*, that the act of the justice in calling upon the attorney to produce his authority, adjourned the proceeding and marked it dismissed was without authority and void; [14] that as no answer had been interposed or jurisdictional defect pointed out, it was the duty of the justice to make a final order awarding the landlord possession of the premises, and issue his warrant thereon, [17] and as that act, although of a quasi judicial nature, was purely clerical or ministerial in its character, not calling for the exercise of judgment, and admitting of but one result, [15, 18, 19] a writ of mandamus could and should issue requiring the justice to sign a final order and issue the warrant. [18, 20]

People v. Willis (8 Abb. Pr., 212) followed. [20]
(Decided October, 1892.)

Application by the relator for a peremptory writ of

Allen v. Murray.

mandamus directing the defendant to sign, as justice of the district court for the eleventh judicial district, a final order in a summary proceeding brought to recover possession of real property, and issue his warrant therein.

The relator instituted a summary proceeding before the court of which the respondent is justice, to dispossess a tenant for non-payment of rent. The precept was returnable September 30, 1892, at 10 A.M., at which time the landlord appeared, by Wm. H. Secor as his attorney, and the tenant appeared in person. No answer was filed, nor were any objections raised either as to jurisdiction of the court or the sufficiency of the papers. The tenant did not dispute Mr. Secor's right to appear for the landlord, nor did he call for any proof of his authority. The justice in his return states that he, of his own motion, called upon Mr. Secor to produce his authority to appear, and, upon his failure to do so, adjourned the proceeding till October 3, and on that day, for want of the landlord's appearance, endorsed upon the precept the word "dismissed." The relator now applies for a writ of mandamus commanding the justice to sign the final order and issue the warrant thereon, that the tenant may be removed from the demised premises according to the statute in such case made and provided. Notice of the application was served upon the tenant as well as the justice.

William H Secor, for relator and motion.

Allen & Murray, for defendant, opposed.

MCADAM, J.—Assuming, for present purposes, that § 1382 of the Consolidation act (*Laws of 1882*, chap. 410) relating to actions in the district courts, applies to summary proceedings, and that an appearance by the landlord on the return day is necessary to prevent a dismissal of his proceeding, we must inquire whether the appear-

Allen v. Murray.

ance by Mr. Secor was not sufficient to satisfy all legal requirements.

Mr. Secor was an attorney and counselor, admitted by the supreme court to practice law in *all* the courts of the state. In courts of record his authority would be presumed (*Denton v. Noyes*, 6 *Johns.*, 295, followed as ['] authority in *Vilas v. Chase*, 19 *N. Y. Civ. Pro.*, 333). True, the rule never applied to justices' courts, because there are no attorneys within the professional meaning of that term in these courts (*Hughes v. Mulvey*, 1 *Sandf.*, 92; *Fox v. Jackson*, 8 *Barb.*, 355; *Sperry v. Reynolds*, 65 *N. Y.*, 179). There is another reason. Prior to the Constitution of 1846, and the Judiciary act of 1847, passed in aid of it, each court of ['] record (even the old marine court) regulated the admission of its own attorneys, and had separate rolls on which appeared their honored names. In this manner the attorneys entitled to practice in each court were made known to its judges (See *N. Y. Const. of 1777*, art. 27), but these regulations never reached the justices' courts, which seem to have been regarded as sort of "go-as-you-please" tribunals, in which any one was entitled to practice, whether licensed to do so or not. The power emanated from the client—not the court.

The cases cited, founded on the old rule, no longer apply to the district courts, in which attorneys are ['] recognized as officers by force of express statute.

The act of 1857 (ch. 344, § 30) provides for an extra allowance of costs where an attorney is actually engaged in the prosecution or defense of the action, and by the *Laws of 1862* (ch. 484) it is not only a misdemeanor to practice in these courts without being admitted to ['] the bar, but all the rules and regulations of the supreme court are made applicable thereto, so far as the same can be made applicable, and those relating to attorneys and counselors may well be so applied in all their rigor. This was evidently the legislative intent, and

Allen v. Murray.

effect must be given to it (See *Newburger v. Campbell*, 9 *Daly*, 102).

The act of 1862 (*supra*) was designed to effect a radical change by driving away from these courts a class of irresponsible, unlicensed practitioners, tolerated under the old rule, by substituting in their stead—under the new one—attorneys of the supreme court, whose office protected both court and litigants from all fear of imposition. It was an effort to elevate the tone, character, and dignity of the district court by improving its surroundings. It was a much-needed reform, and has worked well. When progress is made its concomitants go with it; all look forward—not backward. Such being the present relation between the district court and the supreme court attorneys, the justice, who knew Mr. Secor was an attorney, had no power to call upon him to produce a special authority to appear for Mr. Allen—his office conferred that right. The tenant did not question Mr. Secor's right to appear, and the justice was not called upon to dispute it. The nature and extent of the remedy now applied for will be next considered.

The distinction is, of course, to be observed between a direction to an inferior tribunal to act, and a command by mandamus directing it *how* to act. Thus, mandamus may command the inferior tribunal to act and proceed to judgment, yet it will not, as a rule, prescribe what judgment to give. The mandate is that the officer proceed, adjudicate, and exercise his judgment upon the questions of law and fact involved, leaving whatever error may be committed to be corrected on appeal after the decision is filed.

While the determination of the inferior court upon the merits will not be controlled by mandamus, yet, if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, and there is no other remedy,

Allen v. Murray.

mandamus will lie to compel it to proceed (*Costello v. St. L. C. Ct.*, 28 *Mo.*, 259).

In *People v. Mayor* (10 *Wend.*, 393, 397), NELSON, ['] C. J., referring to mandamus, said, that "whenever a legal right exists, the party is entitled to a legal remedy, and when all others fail, the aid of this may be invoked." This case and others show that when a specific duty is imposed by statute on public officers, they may be compelled to execute it by mandamus.

The office of the writ and its extent are well stated by Chief Justice SPENCER in *People v. Supervisors* (12 *Johns.*, 415), and that is "to require the persons to whom it [10] is directed to do some particular thing, which appertains to their office or duty, and which the court issuing it supposes to be consonant to right and justice; and that if the party making the application has a legal right, and no other specific remedy, the writ generally goes."

The party aggrieved is bound to show as the foundation of the proceeding that the specific act sought to be coerced is the duty of the person against whom the [11] writ is directed, and that such person has no discretion as to its exercise.

The statute under which the original proceeding in this matter was taken, provides, that "if *sufficient cause* is not shown upon the return day of the precept . . . the justice *must* make a final order, awarding to the petitioner the delivery of the possession of the property" (*Code Civ. Pro.* § 2249).

The phrase "*sufficient cause*," to the contrary, means some legal reason why the order should not [12] be made, such as the filing of an answer creating an issue, or the discovery of objections fatal to the proceeding or the jurisdiction of the magistrate. In cases where no such impediment exists, the statute is mandatory, that the justice "*must*" make the final order, and he has no discretion concerning it.

Allen v. Murray.

While the justice had the right to take whatever time was needed to examine the papers to determine [13] whether they followed statutory requirements, he had no power to unreasonably delay the proceeding, nor had he authority to adjourn it on his own motion, without the filing of an answer or the consent of parties (Ahrens v. Burke, 63 How. Pr., 50), and all his pro- [14] ceedings taken after the return day of the precept are in consequence *coram non judice* and void, and the matter must be treated as if no such proceedings had followed.

The writ of mandamus has been given to compel the entering of judgment where nothing remained but the mere ministerial duty of making the proper entry (Williams v. Saunders, 5 Cold., 60; Smith v. Moore, 38 Conn., 105).

Indeed, in a case like the present, the signing of the final order might be considered as merely ministerial, corresponding in this respect with the duty of the [15] clerk of a court of record in entering the judgment of the court, an act clearly enforceable by mandamus (Smith v. Moore, *supra*). The clerk could not, by adjourning the performance of the act for a week or any other stated period, absolve himself from his statutory duty, nor could he then by any act of his declare the proceeding terminated, and avoid his duty. There is no substantial difference between the case put and the one now before the court.

The statute, as its title indicates, intended the proceeding to be "summary, short, sharp, decisive, and [16] the legislative purpose and intent must be respected."

If an answer had been filed or if objections had been made which necessitated an adjournment or required judicial examination, a case calling for the exercise of judicial judgment might have been presented, and a dif-

Allen v. Murray.

ferent question would have arisen, so in regard to motions to adjourn after issue joined (*Code Civ. Pro.* § 2248).

The tenant not having questioned Mr. Secor's authority there was no issue of that kind raised calling for decision, and the justice had no alternative but to obey [17] the plain mandate of the law, by making the final order which the statute requires he shall make, where no legal reasons exist to the contrary.

The justice having neglected to perform the specific duty imposed by statute, the party making the application having a legal right to its performance, with no [18] other remedy, and the question being one about which there was no discretion, mandamus, which is a remedial writ, will lie to compel the performance of the duty omitted, and this without infringing any of the elementary rules before referred to.

Although of a quasi judicial nature, the act required was purely clerical or ministerial in its character, not calling for the exercise of judgment and admitting of [19] but one result, which was that imposed and specifically pointed out by the statute conferring the authority to act, and as Judge Davies, in *People v. Willis* (3 *Abb. Pr.*, at p. 212), held, the justice "not having performed a duty clearly enjoined upon him by law, a mandamus is the proper remedy to compel him to do so," or otherwise there would be a complete failure of justice, the party aggrieved having no other remedy to obtain his legal rights.

The relator is, therefore, entitled to a peremptory mandamus commanding the justice to sign the final order as of September 30, 1892, and to issue his warrant [20] thereon in due form (*Code Civ. Pro.* § 2251), that the relator may obtain the possession to which he is by law entitled.

Bundschu v. Simon.

BUNDSCHU v. SIMON *et al.*

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, JANUARY, 1893.

§ 803, *et seq.*

Inspection and discovery—may be ordered in action against assignee for benefit of creditors.

An inspection and discovery of books and papers of defendant which are in the possession of another defendant as his assignee for the benefit of creditors may be directed in an action brought by a creditor of the assignor after the refusal of the assignee to bring it, to set aside a chattel mortgage made by the assignor, and preferences made by him in the assignment, and to recover moneys paid out by him before the assignment, which mortgage, preference, and payments are alleged to have been made for and on account of fictitious indebtednesses to the creditor so preferred, where it is alleged in the moving affidavits that such books and papers contain evidence to support such allegation.

(Decided January 24, 1893.)

Motion by plaintiff for a discovery of books and papers.

The plaintiff brought this action against Barabas Simon, Joseph Weill as assignee for the benefit of the creditors of Barabas Simon & Cecile Gabrielle Simon, to set aside a chattel mortgage made by the defendant, Barabas Simon, to the defendant, Cecile Gabrielle Simon, upon certain stock and fixtures used in his business before his assignment, also to set aside a preference of \$2,500 in her favor contained in the assignment, also to recover \$1,750 paid by the assignor to her before the assignment on the ground that such mortgage, prefer-

Bundschu v. Simon.

ence, and payments were made and given for, and on account of, indebtednesses to the defendant, Cecile Gabrielle Simon, which were fictitious. The plaintiffs are general creditors of the assignor, Barabas Simon, and allege that they have demanded of the defendant, Weill, that he bring an action for this relief and that he has refused so to do.

Upon the petition setting forth these facts: that the books and papers of the assignor, Barabas Simon, now in the possession of the defendant, Weil, as assignee, contain entries tending to prove that the claim of the defendant, Cecile Gabrielle Simon, is fictitious, and that an examination by experts is necessary to make such evidence available, and can not be properly or adequately made on the trial; an order was made directing a deposit of the books with a referee, for the purposes of the discovery, or, in the alternative, that the defendants show cause why such relief should not be granted. The books and papers were not so deposited, and accordingly, upon the date named in said order for showing cause, this motion was made.

H. Huffman Browne (*William W. Fletcher*, attorney), for plaintiff and motion.

M. Esberg (*Kantrowitz & Esberg*) and *S. Feuchtwanger*, attorneys, for defendants, opposed.

PATTERSON, J.—This motion is properly made, and the order granted by Mr. Justice BARRETT should be sustained. The inspection and examination of the books is allowed, and, under § 817 of the *Code of Civil Procedure*, they must be deposited with Mr. John B. Pine, who is named as referee to direct and superintend. The inspection and discovery must be made within twenty days.

Cunningham v. Hatch.

CUNNINGHAM, APPELLANT, v. HATCH *et al.*,
RESPONDENTS.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
MARCH, 1893.

§§ 14, 1241, 3343, subd. 2.

*Deposit—return of, improperly withdrawn, when may be enforced by
attachment for contempt.*

Where money was deposited with the county clerk to secure the discharge of a mechanic's lien, and thereafter an action was brought to foreclose the lien, and a dismissal of the complaint was taken by the defendants by default, and the money so deposited withdrawn by them, and thereafter the default was opened, and the defendants ordered to return the deposit—*Held*, that the failure of the defendants to obey such order was a contempt, and should be punished as such; that the case was not one in which the order could be enforced by execution, but was one clearly within the meaning of subdivision 3, § 14 of the *Code of Civil Procedure*.

Forstman v. Schulting (110 *N. Y.*, 110) followed; *Forstman v. Schulting* (42 *Hun.* 643); *O'Gora v. Kearnet* (77 *N. Y.*, 426); *Haebler v. Myers* (132 *Id.*, 363) distinguished.

An order for the return of a deposit which has been improperly withdrawn from court is a mandate.

(Decided March 16, 1893.)

Appeal from an order of the special term denying plaintiff's motion to punish Annie L. Hatch, one of the defendants, for contempt in refusing to obey an order of this court, entered July 16, 1890.

On the 1st day of April, 1889, a mechanic's lien was filed by the plaintiff against the property of the defendants. On the 15th day of July, 1889, the lien was discharged by deposit with the county clerk. On or about

Cunningham v. Hatch.

March 12, 1890, the plaintiff commenced an action to foreclose the lien. On the 4th of June, 1890, while the case was on the equity calendar of this court, a default was taken, and the amount deposited with the county clerk was withdrawn. On the 16th day of July an application was made to open said default, and vacate the judgment entered thereon, which was granted, and the defendants were ordered to restore the deposit to the custody of the county clerk. The deposit was made by Annie L. Hatch, and she received the same when withdrawn. On the 6th of November, 1890, Annie L. Hatch was personally served with a certified copy of the order opening the default, and requiring the money withdrawn to be restored, together with a notice that she forthwith return to the custody of the county clerk the sum of money withdrawn. The case has since been tried before Judge BOOKSTAVEE, who, on the 17th of February, 1891, handed down a decision holding that the plaintiff had a lien against the property described in the complaint, that it had been superseded by the deposit with the county clerk, and that the said lien was transferred to and existed against the sum of money in the custody of the county clerk. The defendants are insolvent, and an ordinary judgment against them would be uncollectable. Thereafter an application was made at special term, Judge BISCHOFF presiding, to punish the defendant, Annie L. Hatch, for contempt, which was denied solely for want of power, and an order to that effect was entered on the 29th of December, 1892, which is the order appealed from. The other facts, pertinent to the question under consideration, are stated in the opinion.

A. C. Palmer, for plaintiff, appellant.

Royal S. Crane, for defendant, Annie L. Hatch, respondent.

GIEGERICH, J.—The only question presented by this

Cunningham v. Hatch.

appeal is whether the defendants can be punished for a contempt by reason of their disobedience of the order requiring them to return the deposit to the county clerk, which was affirmed on appeal (*Cunningham v. Hatch*, 18 *N. Y. Suppl.*, 458).

The learned judge who presided at the special term where the order appealed from was made, assumed that the practice governing the restitution of moneys obtained by means of a judgment or order, which is subsequently reversed or set aside, applied to the deposit in question; and he accordingly held that the latter was but money due upon an implied contract, and that under the provisions of section 16 of the Code of Civil Procedure, restitution thereof could not be compelled by proceedings to punish as for a contempt.

The case of *Forstman v. Schulting* (42 *Hun*, 643), is cited in support of this ruling. In that case an attorney received moneys under an erroneous order, which was subsequently reversed; he several times promised to repay them, but failed to do so. On a motion made to punish him for contempt, the court held that where money has been received under an erroneous decision, the party receiving it is equitably bound to refund it, and the law will imply a promise on his part to pay it over, as it will ordinarily in cases where one person receives money belonging to, or for the use of another; and that the remedy for the case was the issuance of an execution pursuant to section 779 of the Code of Civil Procedure.

The case of *O'Gora v. Kearnet* (77 *N. Y.*, 426), is also relied upon by the respondents to sustain the order appealed from. In that case the order was dismissed with costs, which were voluntarily paid by the attorney. The judgment was afterwards set aside and the defendant was directed to pay the costs to the plaintiff, and in default of payment he was adjudged guilty of a contempt. On appeal this was held to be unauthorized and void; and it was further held that the case came clearly under the

Cunningham v. Hatch.

provisions of section 1240 of the Code of Civil Procedure, which relates to the enforcement of a judgment by execution, and not under section 1241, which prescribes in what cases a judgment may be enforced by punishment for disobeying it; because the judgment directed payment of money to the party, and not to the court or an officer of the court.

These cases are distinguishable from the one before us. There the payment of money was directed after the rights of the parties had been finally adjudicated, while in the case at bar the defendants were required to return the deposit to the county clerk to await the determination of the rights of the parties to the action. There is a wide distinction between an order requiring the payment of money to a party, and the return of a deposit to the officer who is the legal custodian thereof, which is recognized by section 1241 of the Code of Civil Procedure. The rule that the law implies a promise to repay moneys paid upon a judgment or order which has been reversed or set aside, is founded on justice and reason. It does not obtain, however, until the judgment or order has been reversed. (*Hæbler v. Myers*, 132 N. Y., 363.) Applying these rules to this case, it is clear that a promise either expressed or implied, cannot be inferred for the reason that the return of the deposit was required before the rights of the parties interested therein had been determined, and which are still awaiting final determination.

Now it is not even pretended by the respondents that the order directing a return of the deposit can be enforced by execution against the property of the defendants. As it cannot, what remedy has the appellant for the enforcement of the order in question? If the contention of the respondents prevails, then the appellant has absolutely none until the entry of final judgment in the action; in other words all proceedings for the enforcement of the order are *suspended* until then. Thus dishonest litigants

Cunningham v. Hatch.

would not only be tempted to appropriate a "deposit" to their own use, but would be encouraged in their refusal to obey an order made for the return thereof. It would be manifestly unjust to those entitled to the fund, to determine that, until a final judgment had been entered herein, the court is powerless to prevent the defendants from converting to their own use the deposit in question, the withdrawal of which the learned judge found may defeat, impair, impede, or prejudice the right or remedy of the plaintiff in this action. And it would indeed be a reproach to the law if it were not in the power of the court to compel the return of the deposit to the custody of the proper officer. Fortunately for the honor of our system of jurisprudence, the law affords ample remedy.

Chief Judge RUGER, in delivering the opinion of the court in *Forstman v. Schulting* (110 N. Y., 110), well says: "Both parties and attorneys, who through the aid of the court, have come into possession of property or money during a litigation, which subsequent proceedings in the action show was either wrongfully acquired or wrongfully retained, may be compelled to restore it to the rightful owner by order and *attachment to enforce such restoration.*"

Section 14, of the Code of Civil Procedure, prescribes: "A court of record has power to punish by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded or prejudiced, in either of the following cases. * * *

"3. A party to an action or special proceeding, an attorney, counselor or other person, for the non-payment of a sum of money ordered or adjudged by the court to be paid in a case where by law execution cannot be awarded for the collection of such sum; *or for any other disobedience to a lawful mandate of the court.*" * * * * *

Hiscox v. New Yorker Staats Zeitung.

The order for the return of the deposit is a mandate (Code of Civil Pro. § 3343, *sub.* 2); and the case at bar comes clearly within the provisions embraced in the last sentence of subdivision 3 of section 14 of the Code.

We have carefully considered the case of Haebler v. Myers, *supra*, and find nothing therein, which, in our opinion, affects our determination of the question under consideration.

The order should therefore be reversed with costs.

PRYOR, J., concurred.

HISCOX v. NEW YORKER STAATS ZEITUNG AND
ANOTHER.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
MARCH, 1893.

§ 819.

Consolidation of actions—effect upon right to costs.

By consolidating two actions the original actions are discontinued and only the consolidated action remains, and the successful party thereto will be entitled to tax only the cost of the consolidated action, unless the right to tax the cost of the discontinued action is reserved in the order directing the consolidation.

Blake v. Mich. So. R. R. Co. (17 How. Pr., 228), followed: Carl v. Lefferts (1 Johns. Cas., 395), not followed.

Where two actions were brought against a corporation and an individual respectively, to recover for the same libel, and issue was joined in one of the actions, and it was placed on the calendar and noticed for trial, and thereafter the two actions were consolidated into one, entitled against both defendants, and the service of an amended complaint and answer was directed, and it was also directed that the "cause retain its place upon the calen-

Hiscox v. New Yorker Staats Zeitung.

dar," and thereafter the defendants made an offer of judgment, which was accepted—*Held*, that the plaintiff was entitled to costs and disbursements only from the time of the consolidation of the original actions; that as the cause had not been noticed for trial subsequent to the consolidation, the only costs taxable were for proceedings before notice of trial, and disbursements made or incurred between the time of the consolidation and the time of the making of the offer of judgment.

(*Decided March 23, 1893.*)

Motion by both parties for a new taxation of costs.

The facts are stated in the opinion.

Samuel Blythe Rogers, for plaintiff.

J. H. K. Blauvelt, for defendants.

GIEGERICH, J.—This action is the result of the consolidation of two actions, against the *Staats Zeitung* and Mr. Ottendorfer, respectively. The Ottendorfer case was commenced first, and the plaintiff afterward brought suit against the newspaper. Both actions were brought for the same libel, published in the aforementioned newspaper. Issue was joined in the *Staats Zeitung* case, which was placed on the calendar, and a notice of trial was served. Issue was joined in the case against Mr. Ottendorfer, and a notice of trial was served, but the cause was not put upon the calendar.

On February 9, 1893, an order was entered consolidating these two actions into one, entitled against both defendants, and directing the service of an amended complaint and answer in the consolidated action, and that "said cause retain its place upon the calendar." A few days thereafter the defendants made an offer of judgment, with costs, in the action so consolidated, which was accepted, and the plaintiff is about to enter judgment thereupon. No notice of trial has been served in the consol-

Hiscox v. New Yorker Staats Zeitung.

idated action. The plaintiff's proposed bill asks for costs to date in the Staats Zeitung case, and these were allowed by the clerk, although objected to by the defendant. The plaintiff asked also for costs in the Ottendorfer case, which, on being objected to by the defendant, were disallowed by the clerk.

Both parties apply for a review of the clerk's taxation. The plaintiff contends that "neither action was discontinued," but that both actions "continue alive," and that they "simply merged into each other." The authorities, however, do not favor this contention. By consolidation the other actions were discontinued, and only the consolidated action remains (*Blake v. Mich. So. R. R. Co.*, 17 *How. Pr.*, 228).

The case of *Carl v. Lefferts* (1 *Johns. Cas.*, 395), decided in 1800, seems to hold the contrary; but this case cannot be regarded as an authority, for the very objects of consolidation are to prevent the unnecessary accumulation of costs and a multiplicity of actions (*Thompson v. Shepard*, 9 *Johns.*, 262; *Brewster v. Stewart*, 3 *Wend.*, 441; *Blake v. Mich. So. R. R. Co.*, *supra*; *Third Ave. R. R. Co. v. Mayor*, 54 *N. Y.*, 159; see 2 *McCarty's Civ. Pro. R.*, 177. *Note on consolidation of actions*).

Where a consolidation is ordered, the successful party will be entitled to tax only the costs of the consolidated action, unless the right to tax the costs of the discontinued action is reserved in the order (*Blake v. Mich. So. R. R. Co.*, *supra*; 1 *Rumsey's P.*, 236).

HOGEBROOM, J., in delivering the opinion of the court in the case of *Blake v. Mich. So. R. R. Co.*, *supra*, well says: "I know of no principle by which costs, in actions discontinued, can be included in another action, even though it embraces the cause of action in the first. Provision for such costs must be made in the discontinued actions before they finally cease to exist."

Inasmuch as the order of consolidation contains no provision reserving the right to costs of the original ac-

Walker v. Scott.

tions, already accrued, it follows, that the plaintiff is not entitled to costs in either of them (*Blake v. Mich. So. R. R. Co.*, *supra*).

The plaintiff, therefore, should be allowed only costs of the consolidated action.

For these reasons the taxation of the plaintiff's costs should be set aside, and a new taxation directed before the clerk, who should allow to the plaintiff costs and disbursements in the consolidated action only from the time of the consolidation of the original actions, viz: February 9, 1893, to the time when the offer of judgment was made, and disallow all items in the two actions which were consolidated. The clerk will therefore allow only for proceedings *before* notice of trial, and disbursements made or incurred since February 9, 1893, to the time when the offer of judgment was made.

WALKER v. SCOTT.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
APRIL, 1893.

§§ 2863 subd. 4, 2944, 2945-2950, 3215.

Pleadings—Amendment of, in action removed from district court to court of common pleas.

The rule that the issue created by the pleadings in an action commenced in one of the district courts in the city of New York are those to be tried on its removal to the court of common pleas, is subject to the qualification that the action so removed continues in all respects to be an action in the district court, the trial of which is to be had in the court of common pleas, and, therefore, it is subject to the incidents of such an action, including the

Walker v. Scott.

right of amendment of the pleadings within the limits of the jurisdiction of the district courts.

Latteman v. Fere (11 *N. Y. Civ. Pro.*, 217) followed.

Counterclaims may be interposed in an action in a district court in the city of New York, but the provisions of the *Code of Civil Procedure* (§§ 2945-2950) relative to counterclaims in justices' courts, and which afford an ample remedy to those having counterclaims in excess of those of which said courts can entertain jurisdiction, do not apply to such district courts.

The jurisdiction of district courts in the city of New York is limited to cases where the sum claimed does not exceed \$250, and, therefore, those courts have no jurisdiction of a counterclaim for a greater sum.

Ludwig v. Minot (4 *Daly*, 481) not followed; *Druckenmiller v. Shoninger* (15 *Id.*, 477) followed.

Where in an action brought in a district court in the city of New York to recover \$162, the defendant interposed a counterclaim for \$100, and secured the removal of the cause to the court of common pleas, and thereafter order was made "that the pleadings in this action, originally brought in the district court . . . be reduced to writing," and the plaintiff served a sworn complaint, and the defendant served an answer, setting up new defenses and a counterclaim for \$500—*Held*, that the answer should be stricken out; that as the answer was amended without leave of court it was unauthorized and in violation of the order entered, and that even if leave had been sought to serve an answer setting up the larger counterclaim, it could not have been granted, inasmuch as the counterclaim was for a greater sum than the court could entertain jurisdiction of in such an action.

(*Decided April 1, 1893.*)

Motion to strike out an answer.

The action was commenced in the district court in the city of New York for the ninth judicial district. The pleadings were oral. The complaint was for \$162, commissions on the exchange of real estate, and the answer was a general denial and a counterclaim for \$100.

On the defendant's application, the case was removed to this court. Under an order that the pleadings be in writing, a sworn complaint was served. The written answer of the defendant admits that the plaintiff was the

Walker v. Scott.

broker through whom the negotiations were made, and interposes a counterclaim for \$500, the alleged difference between the actual value of the property purchased and the price paid upon plaintiff's representation of its value. The answer also alleges that the plaintiff has assigned his interest in the claim or demand sued upon, and that the plaintiff is not the real party in interest.

The plaintiff then moved to strike out the answer served upon him.

Robert J. Robeson, for plaintiff and motion.

Jared F. Harrison, for defendant, opposed.

GIEGERICH, J.—The rule that the issue created by the pleadings in an action commenced in one of the district courts in this city are those to be tried on its removal to this court (*Smith v. White*, 23 *N. Y.*, 572; *Salter v. Parkhurst*, 2 *Daly*, 240; *Druckenmiller v. Shoninger*, 15 *Id.*, 477), is subject to the qualification that the action so removed "continues in all respects to be an action in a district court, the trial of which is to be had in this court" (*Salter v. Parkhurst*, *supra*, per BRADY, J.; *Latteman v. Fere*, 11 *N. Y. Civ. Pro.*, 217-222, BOOKSTAVEN, J.). As was well said by BOOKSTAVEN, J., in *Latteman v. Fere*, *supra*: "If it continues to be, in effect, an action in a district court, then it must be subject to the incidents of such an action, among which is the right of amendment of the pleadings within the limits of the jurisdiction of the district courts."

Section 2944 of the *Code of Civil Procedure* (which § 1347 of the *Consolidation Act*, *Laws*, 1882, chap. 410, expressly makes applicable to district courts), prescribes: "The court must, *upon application*, allow a pleading to be amended at any time before the trial, or during the trial, or upon appeal, if substantial justice will be promoted thereby." I concur in the opinion expressed by the

Walker v. Scott.

learned judge in *Latteman v. Fere*, *supra*, that pleadings "may be amended within the limits of original jurisdiction."

Now, was the interposition of the counterclaim for a sum in excess of the amount claimed in the court below, warranted under the circumstances? The *Consolidation Act* (§§ 1361, 1380, 1383) permits a counterclaim to be interposed in district courts. The same, however, omits to make the provisions of the *Code of Civil Procedure* relative to counterclaims in justices' courts (§§ 2945-2950) applicable (see *Laws*, 1882, chap. 410, §§ 1285, 1343). It is to be regretted that these provisions have not been made a part of the *Consolidation Act*, because ample remedy is thereby afforded to those having counterclaims in excess of the amount for which those courts can entertain jurisdiction. Under the old practice, the jurisdiction of the district courts was restricted to cases "where the sum *recovered* shall not exceed \$250, notwithstanding the accounts of both parties may exceed \$400" (*Laws*, 1857, chap. 344, § 3, subd. 1; *Langbein's Dist. Ct. Pr.*, ed. 1872, p. 33). A careful scrutiny of the *Consolidation Act* shows that these provisions have not been retained, and that the jurisdiction of these courts has been limited to cases "where the sum *claimed* does not exceed \$250" (*Laws*, 1882, chap. 410, § 1285).*

Further examination shows that § 3215, subd. 1, of the *Code of Civil Procedure* expressly provides that subdivisions 1 and 4 of § 2863 do not apply to an action brought in the district courts, the latter providing: "4. Where in a matter of account the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400."

These views, I think, are confirmed by the cases of *Ludwig v. Minot* (4 *Daly*, 481), and *Druckenmiller v. Shoninger*, *supra*. The former arose under the act of 1857, and it was held therein that more than \$250 may

* Same provision *Code Civ. Pro.*, § 3215.

Walker v. Scott.

be recovered in an action removed from a district court to this court, if claimed in the summons. The latter arose subsequent to the enactment of the Consolidation Act. That case was commenced in a district court to recover \$250, and was removed to this court on the defendant's application. The complaint subsequently served demanded judgment for \$700. The defendants answered, denying the jurisdiction of the court. The plaintiff demurred to the answer, and the demurrer was overruled on appeal, and the order appealed from affirmed. LARREMORE, C. J., in delivering the opinion of the court in that case (p. 478), says: "It might be said that no meritorious objection could be made to plaintiff serving a written complaint after removal to this court demanding damages for a sum in excess of the amount the district courts *could entertain jurisdiction for*; but such practice would unsettle all orderly methods of procedure."

Inasmuch as the counterclaim interposed by the written answer is for a sum greater than this court has power in this action to entertain jurisdiction of, I am of the opinion that the court would not have had the power to amend the answer as served, even had the defendant applied for permission to do so. Assuming, however, that I am in error as to the views above expressed, still the service of the answer which sets up new defences and interposes a counterclaim for a larger sum, without leave of court, was unauthorized, and in violation of the order entered herein, "that the pleadings in this action originally brought in the district court in the city of New York for the ninth judicial district be reduced to writing" (Smith v. White, *supra*).

Motion granted, unless the defendant shall apply for and obtain leave of court to amend the answer within a period of time to be specified in the order to be entered on this decision; but in view of the novelty of the questions involved, no costs to either party will be allowed. Settle order on notice.

Rauth v. New York Elevated Railroad Co.

RAUTH v. NEW YORK ELEVATED RAILROAD
COMPANY.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM, APRIL, 1893.

§ 723 *et seq.*

Amendment of judgment—power of court to direct.

While the court should not, after final judgment, change by amendment a ruling upon the law, or alter the decision upon the merits, it has the power of amendment in certain directions where the substantial rights of the adverse party are not really affected.

A court of equity or a superior court of record has always power over its own judgments, and the general practice permits courts to control their judgments in the interest of practice.

Where a judgment restrained an elevated railroad company from operating its railroad unless within a time named therein, it pay to the plaintiff a sum fixed thereby as the damage done to the plaintiff's property by the maintenance of such railroad, and it appears that the railroad company cannot find the plaintiff for the purpose of tendering the sum so directed to be paid her, a motion that the final judgment be amended so as to permit the payment of the money into court should be granted.

(Decided, April 5, 1893.)

Motion by the defendant that the final judgment in this action be amended so as to permit defendant to pay into court the sum directed thereby to be paid plaintiff.

The opinion states the facts.

Davies, Short & Townsend, for defendant, and motion.

Townsend, Dyett & Einstein, for plaintiff, opposed.

Rauth v. New York Elevated Railroad Co.

GILDERSLEEVE, J.—The judgment directs that defendants should tender to plaintiff within sixty days the sum of six cents and interest, in avoidance of an injunction restraining defendants from maintaining and operating their elevated railroad in front of plaintiff's premises. The time in which the tender was directed to be made was extended by order, and it expires on April 7.

The defendants have been unable to find the plaintiff, after diligent search, and now ask leave to pay the money into court instead of tendering it directly to the plaintiff.

The plaintiff's counsel objects, on the ground that granting this motion would modify the judgment, and that this can only be done on appeal. I cannot coincide in this view of the case.

It is true, that the court should not, after final judgment, change by amendment a ruling upon the law, or alter the decision upon the merits; but in certain directions it has the power of amendment, where the substantial rights of the adverse party are not really affected (*Bohlen v. Met. El. R. R.*, 31 *St. Rep.*, 888; see also *Genet v. D. & H. C. Co.*, 113 *N. Y.*, 475; *Weil v. Martin*, 1 *Civ. Pro. Rep.*, 133; *Hatch v. Central Nat. Bank*, 78 *N. Y.*, 487; *Conklin v. N. Y. El. R. R.*, 18 *Civ. Pro. R.*, 366; *Jagger v. Cunningham*, 8 *Daly*, 511; *McKelsey v. Lewis*, 44 *N. Y. Super.*, 561, affirmed 76 *N. Y.*, 377; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 *N. Y.*, 257; *Hogan v. Hoyt*, 37 *N. Y.*, 300; *Fry v. Bennett*, 9 *Abb.*, 45; *Brown v. Colie*, 1 *E. D. S.*, 270; *Calmbacher v. Newman*, 18 *N. Y. Supp.*, 198).

A court of equity, or a superior court of record, has always power over its judgments (*Calmbacher v. Newman*, *supra*; *Dietz v. Farisch*, 43 *N. Y. Super.*, 87). The general practice permits courts to control their judgments in the interest of practice (*Genet v. D. & H. C. Co.*, *supra*).

This motion does not ask to have the judgment amended to the prejudice of any substantial right of the adverse party, but simply for further relief in the line of the judgment, supplying a remedy for an evil, *i. e.*, the

Marx v. Gross.

difficulty of finding the plaintiff, which could not have been foreseen when the judgment was rendered. The relief here asked for is within the inherent powers of the court (*Calmbacher v. Newman, supra*, and cases above cited), and should be allowed.

Motion granted, without costs.

MARX *et al.*, APPELLANTS, v. GROSS *et al.*, RESPONDENTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL
TERM, MARCH, 1893.

§§ 3238 *et seq.*

Costs—when cannot be again taxed, after having been once paid as condition of obtaining a favor.

Where the defendants in an action were permitted to withdraw a juror and amend their answer upon paying the costs and disbursements of the action to date, and they did so, the plaintiffs upon succeeding on a second trial are not entitled to tax the items of costs so paid. The order permitting the withdrawal of a juror and amendment of the pleadings was a final adjudication that the items of costs covered by it belonged to the plaintiff, and they can not be again taxed in favor of either party.

(Decided March 6, 1893.)

Appeal by the plaintiffs from order of the special term denying a motion for a new taxation of costs.

The facts appear in the opinion.

George A. Black, for plaintiffs, appellants.

Foster & Thompson, for defendants, respondents.

VOL. XXIII.—7.

Fry v. Manhattan Railroad Co.

DUGBO, J.—During the trial the defendants obtained leave to withdraw a juror upon paying the costs and disbursements of the action up to date. They paid the costs and amended. A final judgment was obtained by the plaintiffs, who presented a bill of costs, from which, upon taxation, the clerk struck all items included in the costs paid as a condition of obtaining leave to amend. From an order made at special term affirming the taxation this appeal was taken.

The clerk's action was proper. The items in question were finally disposed of by the order allowing the defendant to amend; they having paid the costs and amended. The order was an adjudication that the items covered by it belonged to the plaintiffs. They could not be again taxed in favor of either party. *Seneca Nation v. Hawley*, 32 *Hun*, 288; *Provost v. Farrell*, 13 *Hun*, 303.

Order affirmed, with \$10 costs and disbursements.

SEDGWICK, Ch. J., and GILDERSLEEVE, J., concurred.

FRY, RESPONDENT, v. MANHATTAN RAILROAD COMPANY et al., APPELLANTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, MARCH, 1893.

§§ 893 et seq.

Commission—what interrogatories should be allowed—ground of objection thereto.

Upon the settlements of interrogatories to be annexed to a commission, the pertinency of questions sought to be asked is determined not by the fact that they do not at present seem pertinent, but by the fact that they may under some circumstances become pertinent.

Uline v. N. Y. Cent. & H. R. R. Co. (79 *N. Y.*, 175) followed.

Fry v. Manhattan Railroad Co.

It is no objection to interrogatories proposed to be annexed to a commission, that they call for matters concerning the private business of the witness to be examined.

The fact that interrogatories proposed to be annexed to a commission call for such a mass of written testimony that it will be a great burden for the witness to produce it, is not a ground of objection thereto.

(Decided March 6, 1893.)

Appeal by the defendants from an order of the special term, allowing the interrogatories proposed to be annexed to a commission issued to take testimony in another state for use in this action.

The facts appear in the opinion.

Bartlett, Wilson & Hayden and *Strong & Cadwallader*,
for defendants, appellants.

Leopold Wallack, for plaintiff, respondent.

SEDGWICK, Ch. J.—A ground taken below and on the present argument was that, under the pleadings, the plaintiff would be called upon to prove “only whether the plaintiff introduced the business described in the complaint to the defendants, as alleged in paragraph 12, and whether the defendants agreed to pay the plaintiff \$59,000 for his services in introducing said business to them, and in connection therewith.” If we assume that this is correct, and if we omit to consider that the plaintiff may have, in his opening case, to show declarations of the defendants as to relevant matters, and which might be contained in the answers to the interrogatories objected to, yet all this will not exclude the right of the plaintiff to prepare for a rebutting case. On the trial it might turn out to be a duty, and the plaintiff could not have relief from the consequence of not being prepared with testimony. If, as it is reasonable to believe from the statements of the learned counsel for the appellant, there is a

Fry v. Manhattan Railroad Co.

conflict of testimony, and the credibility of witness is involved, the plaintiff is bound to prepare for that emergency, and to endeavor to show that the greater weight is with the plaintiff. It is in view of these considerations, and of others, that in settling interrogatories the courts have used the word "pertinent." There may be combinations of circumstances which convince one that now or hereafter a question is not and will not be pertinent. But the general object is not merely to ask, Does the question seem pertinent in the present? but also how it would seem upon the trial. Such is the result of the decision in *Uline v. N. Y. Central & H. R. R. Co.*, 79 N. Y., 175. To a great degree the actual pertinency will appear only upon the introduction on the trial of some evidence which then makes the pertinency. A judge settling interrogatories cannot hold that such a contingency will not arise. In the present case the question should not be overruled, because it is preposterous to suppose that anything may happen on the trial which will make answers to the question competent as evidence. On the other hand, if plaintiff's position be correct, it is not unlikely that statements in writing and verbal admissions of the defendants, in respect of plaintiff's relation to the business, may be shown in the answers favorably to the plaintiff.

It may be true that the questions called for matters that concern the private business of the witness to be examined. This would not be an objection to the questions if they called for relevant and pertinent testimony. It may also be that the questions called for such a mass of written testimony that it will be a great burden to the witness to produce. This is a thing that will not be injurious to the defendants, and cannot be a ground of appeal.

Order affirmed with \$10 costs.

GILDERSLEEVE, J., concurred.

Blanc v. Blanc.

BLANC, APPELLANT, v. BLANC, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
FEBRUARY, 1893.

§§ 544, 1770.

Supplemental answer—when adultery committed subsequent to commencement of action for divorce, may be set up by—counterclaim.

The power of the court to permit the defendant in an action for divorce to plead by supplemental answer, as a defense, acts of adultery committed by the plaintiff since the action was begun, is undoubted.

Under the *Code of Civil Procedure*, adulteries committed by the plaintiff in an action for divorce may be pleaded by leave of the court, both as a counterclaim and as a defense to the action.

The rule prior to the *Code of Civil Procedure*, and in England, New Hampshire, and Kentucky stated.

The fact that both parties to an action for divorce have noticed it for trial at a special term does not deprive the court of power to permit a supplemental answer to be served, setting up as a defense and counterclaim adultery committed by the plaintiff subsequent to the bringing of the action, and where that is done, all the issues in the action, including those joined by the original and supplemental pleadings, must be tried before a jury, unless both parties waive such a trial.

Where an action for divorce had been pending six months, when the defendant moved for leave to plead by supplemental answer as a defense and counterclaim adulteries committed by the plaintiff after the bringing of the action, and it does not appear that the defendant was negligent in not moving at an earlier date, it cannot be held that the motion was made in bad faith, and for the purpose of delay.

(Decided February 17, 1893.)

Appeal by the plaintiff from an order of the New York county, special term, permitting the defendant to serve a

Blanc v. Blanc.

supplemental answer, setting up as a defense and a counterclaim adulteries alleged to have been committed by the plaintiff since this action was begun.

This action was commenced May 3, 1892, by Frederic N. Blanc against Elizabeth L. Blanc to procure a divorce, on the ground that the defendant had been guilty of adultery. The complaint was served with the summons, and an amended complaint was served on June 27, 1892, to which an answer was served on July 23 following, interposing three defenses, to wit: First, a general denial; second, condonation; third, both as a defense and as a counterclaim, adulteries alleged to have been committed by the plaintiff. The answer asked as affirmative relief for the dissolution of the marriage bonds because of such counterclaim. On July 29, 1892, the plaintiff served a reply, containing a general denial of the allegations of the answer designed to set forth a counterclaim, and in October, 1892, both parties noticed the cause for trial at the ensuing November special term, and it was placed upon the general calendar for that term. On the 16th of November, 1892, the defendant moved at special term for permission to plead by supplemental answer, both as a defense and as a counterclaim, adulteries alleged to have been committed by the plaintiff since the commencement of this action with women other than those named in the original answer. This motion was granted, and from the order thereupon entered, this appeal was duly taken by the plaintiff.

A. J. Dittenhoefer (Dittenhoefer & Gerber, attorneys), for plaintiff, appellant.

William P. Burr (Burr & De Lacey, attorneys), for defendant, respondent.

FOLLETT, J.—Before the Codes, material facts occurring after issue joined could be interposed by way of de-

fence—mere matter of resistance to the plaintiff's cause of action—in an action at law, by a plea *puis darien* continuance (*Grah. Pr.*, 296), or, in a suit in equity, by a supplemental answer or by a cross bill (2 *Barb. Ch. Pr.*, 255; *Story, Eq. Pl.*, § 903).

Section 544 of the Code of Civil Procedure provides that the court may permit a party "to make supplemental complaint, answer, or reply alleging material facts, [] of which he was ignorant when it [his original pleading] was made." The power of the court to permit the defendant to plead as a defence acts of adultery committed by the plaintiff since the action was begun cannot be doubted. Can such acts be pleaded as a counterclaim? It will be observed that the section of the Code above referred to does not limit the use of facts interposed by a supplemental answer to the establishment of a defence to the plaintiff's alleged cause of action. In an action for a divorce the defendant may plead the adultery of the plaintiff as a defence and as a counterclaim; and if proved, the defendant being innocent, a divorce may be denied the former and granted the latter (*Code Civ. Pro.*, § 1770). The right being given to the defendant to plead and prove the adultery of the plaintiff, though committed subsequent to the commencement of the action, it is difficult to see any good reason for denying the defendant affirmative relief. The defendant having been found innocent, and the plaintiff guilty, of the matrimonial offence, why should the judicially established facts be available only as a defence, when, by granting complete relief, justice is done in one action, and the delay, expense and scandal of a second suit avoided? Public policy, the interests of society and of the litigants, alike demand that the rights of the parties should be determined in a single action, unless by so doing some statute or rule of procedure settled by reported cases, is violated. No statute has been cited, nor have we been able to find one, which prohibits the granting of such relief.

Blanc v. Blanc.

The precise question involved in the case at bar could not have arisen in this State before the Code of 1848, because our court of chancery never assumed the power to grant the innocent defendant a divorce for the adultery of the plaintiff, no matter whether it was committed before or after suit brought. Such relief was only attainable by an original or by a cross bill.

In *Milner v. Milner*, 2 *Edw. Ch.*, 114, the application of the plaintiff for leave to file a supplemental bill alleging acts of adultery by the defendant after the filing of the original bill was denied. This case was followed in *Morange v. Morange*, 2 *N. Y. Law Bul.*, 30.

In *Smith v. Smith*, 4 *Paige*, 432, it was held that, in case a plaintiff committed adultery after suit brought for a divorce, leave should be granted the defendant to set up the fact as a defence by a supplemental answer, or by a cross bill. This case was followed in *Strong v. Strong*, 3 *Robt.*, 669, S. C., 28 *How. Pr.*, 432.

When the last case was decided it was a disputed question whether, under the old Code, affirmative relief could be granted in such an action to a defendant (*J. W. B. v. F. D. B.*, 11 *N. Y. Leg. Obs.*, 350; *Anon.*, 17 *Abb. Pr.*, 48; *Leslie v. Leslie*, 11 *Abb. Pr.*, N. S., 311; *Fullmer v. Fullmer*, 6 *N. Y. Wkly. Dig.*, 22, 42; *R. F. H. v. S. H.*, 40 *Barb.*, 9), and the report of the case does not show whether the fact was allowed as a counterclaim as well as a defence.

In *Cornwall v. Cornwall*, 30 *Hun*, 573, which was an action for a limited divorce, the plaintiff was granted leave to file a supplemental complaint alleging acts of cruelty committed after the commencement of the action, but it was intimated that the subsequent acts were proper in characterization of the earlier acts.

This case is in harmony with the decisions in some of the States, which hold that acts of adultery committed, after suit brought by the defendant, with the person charged in the original pleading as a *particeps criminis*,

Blanc v. Blanc.

may be pleaded and proved for the purpose of characterizing their previous relations. *Browne, Div. & Alim.*, 53. See, also, *Borham v. Borham*, 2 *Prob. & Div.*, 193.

The question now before the court was not decided in any of the cases cited, nor were the questions discussed in them nearly related to the point involved in the case at bar; but they are the only decisions found in the Reports of this State which throw light on this controversy; and, there being no statute or decision in the way, we are of the opinion that, under the Code of Procedure, adulteries committed by a plaintiff after suit brought may be pleaded, by leave of court, both as a counterclaim and as a defence.

The ecclesiastical courts of England gave affirmative relief to defendants (2 *Bish. Mar., Div. & Sep.*, § 559), and, when acts of adultery were committed by either party subsequent to the commencement of the action, they could be alleged by a supplemental bill or answer, and, if proved, were given the same force as though alleged in the original pleading (*Barrett v. Barrett*, 1 *Hagg. Ecc.*, 22; *Webb v. Webb*, *Id.*, 349; *Middleton v. Middleton*, 2 *Hagg. Ecc. Supp.*, 134; *Brisco v. Brisco*, 2 *Addams, Ecc.*, 259).

In New Hampshire a supplemental complaint may be filed, alleging acts of adultery committed after suit brought, which, if established, are a ground for a divorce (*Adams v. Adams*, 20 *N. H.*, 299).

In Kentucky, grounds for a divorce *a mensa et thoro*, and for alimony, not existing when the original bill was filed, may be alleged in a supplemental bill, and, if proved, will support a decree (*Butler v. Butler*, 4 *Litt. [Ky.]*, 202; *Logan v. Logan*, 2 *B. Mon.*, 142-148; *McCrocklin v. McCrocklin*, *Id.*, 370).

Without attempting to reconcile *Wheelock v. Lee* (74 *N. Y.*, 495), and *Mackellar v. Rogers* (109 *N. Y.*, 468), or to distinguish them from the case at bar, we think that the fact that both parties noticed the action for trial at a

Flynn v. Central Railway Co.

special term did not deprive the court of power to permit a supplemental answer to be served. All the issues involved in the action, including those joined by the original and supplemental pleadings, must be tried before a jury, unless both parties waive such a trial. Part of the issues should not be tried before the court without a jury and the remainder before the court with a jury.

There is nothing in the record which would justify this court in holding contrary to the decision of the special term, that the motion was not made in bad faith, and for the purpose of delay. When the order was granted the case had been pending but six months, and it does not appear that the defendant was negligent in not moving at an earlier date.

The order should be affirmed, with \$10 costs and printing disbursements.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

FLYNN v. CENTRAL RAILWAY COMPANY OF
NEW JERSEY.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL
TERM, MARCH, 1893.

§§ 263, subd. 7; 1780.

*Jurisdiction—action against foreign corporation—when may be brought
in Superior Court.*

An action against a foreign corporation may be brought and maintained by a resident of this state who is not a resident of the city of New York, in the superior court of the city of New York, for any cause of action. Since the Code of Procedure, section

Flynn v. Central Railway Co.

421, contained a provision to this effect, and the jurisdiction so conferred was permanently continued by article 6, section 12, of the constitution as amended in 1869, subdivision 7 of section 263 of the Code of Civil Procedure, so far as it limits the jurisdiction of the superior city courts in actions against foreign corporations, to cases where the plaintiff is a resident of the city, is unconstitutional.

Robinson v. Ocean Steam Navigating Co. (15 *N. Y. Civ. Pro.*, 188 ; *aff'd* 16 *Id.*, 255); Popfinger v. Yutty (122 *Id.*, 38), followed.
Flynn v. Central Railroad Co. (20 *N. Y. Civ. Pro.*, 179), affirmed.
(Decided March 6, 1893.)

Appeal by defendants from a judgment entered upon the verdict of a jury rendered at trial term in favor of the plaintiff and from an order denying a motion from a new trial.

The facts appear in the opinion.

G. Holmes (De Forest & Weeks, attorneys), for defendant, appellant.

E. B. Terry, for plaintiff, respondent.

GILDERSLEEVE, J.—This action is for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's servants. The defendant first challenges the judgment upon the ground that this court has no jurisdiction either of the person of the defendant or the subject of the action. At the time the injuries complained of were received, and at the date of the bringing of the action, the plaintiff was a resident of Brooklyn. The defendant was a foreign corporation, and the cause of action accrued in the state of New Jersey. This question was first raised by the defendant at special term. Judge McAdam decided it adversely to the defendant's contention, and we concur in the result that he reached, for the reasons set forth in his opinion, from which we quote with approval:

Flynn v. Central Railway Co.

"The defendant claims that because the injury was inflicted in New Jersey, and the defendant is a corporation created under the laws of that state, this court has no jurisdiction, and that, to obtain it against a foreign corporation, two things must concur: First, the plaintiff must not only be a resident of the state, but of the city of New York; second, the cause of action must have arisen within the state of New York. The argument is based on the phraseology of subdivision 7 of section 263 of the Code, which, in view of other legislation, is in some respects confusing. Section 1780 provides that 'an action against a foreign corporation may be maintained by a resident of this state * * * for any cause of action.' This section is a codification of section 427 of the former Code, which provided 'that an action against a corporation created by or under the laws of any other state * * * may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, by a resident of this state, for any cause of action.' So that, prior to the new Code, jurisdiction of actions like the present, both as to parties and subject-matter, was clearly vested in this court. The jurisdiction so confirmed was permanently continued by the provisions of the judiciary article of the constitution, as amended in 1869 (article 6, section 12); and if section 263 of the Code Revision, or any subdivision thereof, in any manner limits or abridges the jurisdiction which the court possessed at the time the revision went into effect, it is to that extent unconstitutional and void. *Popfinger v. Yutte*, 102 N. Y. 38. The right of action is transitory (*McIvor v. McCabe*, 16 *Abb. Pr.* 319; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 *Hun*, 182; *Barney v. Burstenbinder*, 7 *Lans.* 210, S. C., 64 *Barb.* 212); and if process is, as it was here, legally served within the county, the jurisdiction of this court, both as to subject-matter and parties, is complete. In *Brooks v. Mexican Natl. Cons. Co.* (49 N. Y. *Super. Ct.* 234, and 50

Flynn v. Central Railway Co.

N. Y. Super Ct. 281), and *Robinson v. Oceanic S. Nav. Co.* (15 *N. Y. Civ. Pro.*, 188, affirmed 16 *Id.*, 225), the plaintiffs were non-residents of the state—a feature that distinguishes those cases from the one at bar, for the plaintiff here is a resident of Brooklyn in this state. In *Brooks v. Mexican N. C. Co.*, *supra*, section 263 of the Code was discussed, and it was doubted whether this court could take jurisdiction against the force of its provisions. The constitutional objection to that section was neither discussed nor decided. That phase of the question is squarely presented now, and, as the objection is unanswerable, it must be met and sustained. The opinion of the court of appeals, in *Robinson v. Oceanic S. N. Co.* (16 *N. Y. Civ. Pro.*, 255, *supra*), read in connection with that in the *Popfinger v. Yutte* case (102 *N. Y.* 38), clearly sustains the jurisdiction of the court as to both subject-matter and parties.”

Upon the trial all questions in dispute were submitted to the jury, under a very fair and comprehensive charge, which, as a whole, fully protected the defendant's rights. Many exceptions were taken by defendant's counsel to the charge, and to refusals to charge, all of which we have examined, and find none of sufficient merit to call for discussion here. The jury found for the plaintiff. There was no error in the admission or exclusion of evidence, and upon a consideration of the whole case it cannot be held that the verdict is against the weight of evidence. It is a case of conflicting evidence, which falls within the rule that the verdict of the jury should not be disturbed unless there was error in the course of the trial.

The judgment and order appealed from are affirmed with costs.

DUGRO, J., concurred.

Laidley v. Rogers.

**LAIDLEY AS ASSIGNEE OF MARTIN T. LALLY, FOR THE
BENEFIT OF HIS CREDITORS, RESPONDENT, v. ROGERS
et al., APPELLANT.**

§§ 893, 894.

Commission—when oral cross-examination allowed.

Where witnesses to be examined on behalf of the plaintiff in an action without the state are very important ones, and it is apparent, from the nature of the case, that it would be difficult if not impossible, for the defendants to so anticipate what these witnesses would testify to, as to properly frame written cross interrogatories, they should have the right to orally cross-examine the witnesses.

The court has power under sections 893 and 894 of the Code of Civil Procedure to direct the issuance of an oral commission.

On appeal from an order of the special term of the supreme court directing the issuance of a commission, the general term should consider and pass upon the merits.

Instance of a case in which the defendant was permitted to orally cross-examine a witness to be examined by plaintiff on commission, with the right to the plaintiff, if he so elected, to have either an oral redirect examination, or to conduct both direct and redirect examinations orally.

(Decided February 15, 1893.)

Appeal by defendants from an order of the Franklyn county special term, directing that two commissions issue for the examination of two of plaintiff's witnesses and denying defendants' request for leave to orally cross-examine such witnesses.

The action was brought by the plaintiff as assignee of Martin T. Lally under a general assignment made for the benefit of his creditors to recover the sum of \$3,754 from the defendants for the work and labor of said Lally in

Laidley v. Rogers.

constructing a section of the St. Lawrence & Adirondack Railroad. The defendants' answer sets up the defense of payment for all work performed. Said Martin T. Lally has died since the commencement of this action. The moving affidavit made by one of plaintiff's attorneys, alleges "that William A. Dafter, who resides at Swan River, in the state of Minnesota, and Joseph P. Lally, who resides at Detroit, Mich., are necessary and material witnesses for the plaintiff on the trial of this action, and each of them is a necessary and material witness on this trial on the following questions, viz.: upon the amount of work and labor performed by said Lally, and upon the amount of payments which the defendants made to said Lally, and upon the damages which said Lally suffered from the unreasonable delays of the defendants; that said Dafter is a civil engineer, and acted as the engineer of the said Martin T. Lally in the construction of said railroad, and in making the estimates of the amount of work performed, and said Joseph P. Lally was the brother of said Martin, and acted as his confidential man and helper in said work, and said Dafter and said Joseph P. Lally talked with deponent at Malone before they went away, and told deponent what they could swear to, and that they would and could testify as to the amount of work performed by said Lally, and also as to the said delays and damages, all of which are in controversy in this action. That each of said witnesses is a necessary and material witness for the plaintiff on the trial of said action, as deponent has advised the plaintiff, after such statement of said witnesses, and verily believes to be true, and that without the testimony of said witnesses and each of them the plaintiff cannot safely proceed to the trial of this action, as deponent has also advised the plaintiff, after such statement, and verily believes; that neither of said witnesses is now within the state of New York, but the said William A. Dafter is now at or near Swan River aforesaid, and that deponent had a letter from him at that

Laidley v. Rogers.

place recently. That said Joseph P. Lally resides at 76 Windsor street, Detroit, Mich., and is not now in the state of New York, as deponent verily believes, because this deponent had a letter from said Joseph P. Lally, dated and postmarked at Detroit not long ago."

John P. Kellas (Kellas & Munsill, attorneys), for defendants, appellants.

Thomas Cantwell and William P. Cantwell (Cantwell & Cantwell, attorneys), for plaintiffs, respondent.

PUTNAM, J.—This is an appeal by defendants from an order made on motion of plaintiff that two commissions issue to examine two witnesses on interrogatories to be annexed to said commissions, and denying defendants' request to have a provision inserted in said order that they be allowed an oral cross-examination of said witnesses. It is evident from an examination of the affidavits and papers in the case that the witnesses so proposed to be examined by commission are very important ones. They are doubtless plaintiff's principal witnesses to establish his cause of action. It is apparent from the nature of the case that it would be difficult, if not impossible, for the defendants to so anticipate what these witnesses would testify to as to properly frame written cross-interrogatories. I think defendants, if they desire, should have the right to orally cross-examine these witnesses. The court, under sections 893, 894, Civil Code, have the power to direct an oral commission, and have often exercised the power in similar cases. *Smith v. Talmadge*, 3 *N. Y. Law Bul.* 97; *Parker v. Lythgoe*, 13 *N. Y. Supp.* 949; *Wainwright v. Low*, 49 *Hun*, 283, 1 *N. Y. Supp.* 786.

On appeal from the order it is our duty to consider and pass upon the case on its merits. *Jenison v. Bank*, 85 *N. Y.* 546. The order should be modified as follows: It should provide that the commission issue in the or-

Cole v. Lowry.

dinary form, with leave to the defendants to cross-examine the witnesses orally; they, however, to pay the expenses of the commission attendant on said cross-examination; plaintiff to have the right to subject the witnesses to an oral re-examination, if desired; he to bear the expenses thereof. The plaintiff may also, if he so elects, have an oral direct examination of said witnesses, instead of an examination upon interrogatories. I think the order should be modified as above, without costs to either party.

MAYHEM, P. J. and HERRICK, J., concurred.

COLE AND ANOTHER v. LOWRY *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
MARCH, 1893.

§ 3251.

Costs—when two trial fees taxable.

Where a cause appeared on the day calendar, and was dismissed, and thereafter the default was opened without the imposition of terms, and a trial had, resulting in the dismissal of the complaint, the defendant is entitled to tax two trial fees.

Where a cause is at issue on issues of fact, and is regularly noticed for trial and placed on the calendar, and when reached in its order the complaint is dismissed on the failure of the plaintiff to appear, there has been a trial of the action.

(Decided March 27, 1893.)

Motion for a retaxation of costs.

VOL. XXIII.—8.

Cole v. Lowry.

The opinion states the facts.

William B. Mayer, for defendant, Lowry, and motion.

Charles J. Hardy, for plaintiffs, opposed.

GIEGERICH, J.—This cause came regularly on the calendar of this court for trial at a trial term held on the 14th day of November, 1892, and, upon the failure of the plaintiffs to appear, the complaint was dismissed. Thereafter, on the plaintiff's motion, their default was opened, and the case set down for trial for the January term. No costs were imposed as a condition of the opening of the default. When the case was again reached for trial a jury was waived, and a trial was had on February 20, 1893, which resulted in a dismissal of the complaint. The defendant, Lowry, sought to tax two trial fees, but the clerk allowed only one. The plaintiffs insist that there was but one trial of the action. The rule is, however, that where a cause is at issue on issues of fact, and is regularly noticed for trial and placed on the calendar, and, when reached in its order, the complaint is dismissed on the failure of the plaintiff to appear, there has been a trial of the action (*Dodd v. Curry*, 4 *How. Pr.*, 123; *Rogers v. Degan*, 10 *Abb. Pr.*, 314; *Mora v. Great Western Ins. Co.*, 10 *Bosw.*, 622; *Van Gelder v. Hallenbeck*, 15 *N. Y. Civ. Pro.*, 333).

The defendant, Lowry, is therefore entitled to two trial fees—one for the dismissal of the complaint, and the other for the trial of the action; and the clerk will tax the same accordingly.

Retaxation ordered.

BOONE AND ANOTHER, RESPONDENTS, v. MCGUCKEN
et al., APPELLANTS.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM,
 FEBRUARY, 1893.

§§ 8, 9, 14, 2263, 2281.

*Contempt—appeal from order in proceedings to punish for criminal—
 costs—disobedience of injunction—advice of counsel when no
 excuse.*

In case of criminal contempt, rising under §§ 8 and 9 of the *Code of Civil Procedure*, the court has no power to impose costs.^[1-3]

People v. Gilmore (88 *N. Y.*, 626) ^[2]; *Stubbs v. Ripley* (39 *Hun*, 627) ^[3] followed.

Proceedings to punish for contempt are special proceedings, and an appeal lies from an order, which is absolute in adjudging a person in contempt and prescribing punishment.^[4]

Brinkley v. Brinkley (47 *N. Y.*, 40) followed.^[4]

An injunction order is a mandate, and is, therefore, included in the provision of the *Code of Civil Procedure* (§ 14), providing for punishment as a criminal contempt the disobedience to a lawful mandate of the court.^[5]

People ex rel., Negus v. Dwyer (2 *N. Y. Civ. Pro.*, 379) followed.^[5]

A party having knowledge of the existence of an injunction may be punished as for a contempt in violating it, notwithstanding it was served not on him but only on his attorney, although the acts done in violation were upon the assumption that such acts could be safely done notwithstanding the injunction; but unless personal service has been made of the injunction order that willful and deliberate intent essential to constitute criminal contempt is wanting.^[6]

Koehler v. Farmers' & Drovers' Bank (14 *N. Y. Civ. Pro.*, 71) followed.^[7]

A defendant cannot be punished for a civil contempt in violating an injunction order, unless his act might impair, defeat, impede, or prejudice the right or remedy of the plaintiff.^[8]

 Boone v. McGucken.

Duffus v. Cole (15 *N. Y. Supp.*, 370; S. C., 39 *St. Rep.*, 838); *Rhodes v. Linderman* (17 *N. Y. Supp.* 628; S. C., 43 *St. Rep.* 520) followed.^[9]

It is no defense to a proceeding to punish a person who has violated an injunction order for contempt, that he did it under the advice of counsel, although if he has acted in good faith it may be sufficient to protect him from punishment as for a criminal contempt.^[10]

Horley v. Bennett (4 *Paige*, 164) ^[10]; *Railway Company v. Ramsay* (45 *N. Y.*, 654) ^[11]; *People v. Compton* (*Duer*, 512, *aff'd*; 9 *N. Y.*, 268) ^[11] followed.

An order adjudging the members of the common council of a city in contempt in violating an injunction order restraining them from making certain contracts, and fining them \$200 each and costs of the proceeding, is void, if the proceeding is to punish for a civil contempt, unless it appears and is adjudged that the right and remedies of the parties were defeated, impaired, impeded, or prejudiced.^[12,19]

Where an appeal from an order adjudging the defendants in an action guilty of contempt in violating an injunction order, the complaint is not part of the papers used on the appeal, and the affidavits used at special term are very conflicting, and it appears that the order adjudging them in contempt is defective in a material respect, the merits of the case will not be considered.^[20]

King v. Barnes (113 *N. Y.*, 476) ^[12]; *Moffatt v. Herman* (116 *Id.*, 181) ^[14]; *In re Swenarton v. Shupe* (9 *N. Y. Civ. Pro.*, 402) ^[15]; *Dinsmore v. Association* (14 *N. Y. Supp.*, 676) ^[16]; *Sanford v. Sanford* (9 *N. Y. Civ. Pro.*, 289) ^[17]; *Wheelock v. Noonan* (59 *N. Y. Supp.*, 805) ^[18]; *Fischer v. Raab* (81 *N. Y.*, 235) ^[19] followed. (*Decided February*, 1893.)

Appeal by the defendants from an order of the Oneida county special term adjudging them guilty of contempt, and fining them \$200 and \$15 costs, and directing that they be committed to the county jail of Oneida county until the fines are paid.

This action was brought by the plaintiffs as taxpayers of the city of Utica against the defendants, members of the common council of said city, under § 1925 of the *Code of Civil Procedure*, to restrain waste, which it was alleged that the defendants were about to commit, and an injunc-

Boone v. McGucken.

tion order was granted in the action on June 3, 1892, restraining the defendants from making any contracts with any person or corporation for the pavement of certain streets in the city of Utica or any part of them, "when the concrete base will be laid the wearing surface, or pavement proper, the matrix or binding material of which is a cement prepared with the best quality of refined Trinidad asphaltum obtained from the Pitch Lake in the island of Trinidad. And from making any contract affecting said streets or any of them requiring asphalt pavement thereon to be of asphalt from any particular place, and not obtained in the open market by all persons for the same price."

The order also provided that "each member of said common council is enjoined from voting to enter into any such contract on the part of the city of Utica, and from jointly or severally participating in concluding or attempting to conclude any such contract until the further order of the court."

A motion to vacate this order was made by the defendants and denied. Subsequently on July 18, 1892, the common council of the city of Utica adopted certain resolutions, for which the eight defendants, herein proceeded against, as members of the common council, voted. Its resolutions were vetoed by the mayor of the city of Utica on August 15, 1892. He said in his veto message: "The resolution and the subsequent action of the council in the matter of Pitch Lake asphalt appears to me to be a violation of the injunction. Enjoined as I am, as well as the members of the council, I cannot consent to this action and bring the mayor or myself into contempt. I must, for the good name of the city and my personal security, obey the law and respect the order of the court. I therefore return the foregoing resolution, also the ordinance based thereon for the paving of South street, as the same appears in the certified minutes of the

Boone v. McGucken.

common council, under the date of July 27, to your honorable body without my approval."

On the 22d of August a special meeting of the common council was duly held, to consider the act upon said veto, and at its meeting all the aldermen were present, except one, and said resolutions or ordinances for paving South street, Sunset avenue, Jewett place, Jewett street, and Plant street were passed over said veto, by a vote of eight aldermen voting in the affirmative, and three in the negative, and those voting in the affirmative were the defendants now proceeded against. No actual contract in writing was entered into between the city of Utica and the Warren Scharf Company for paving said streets with asphalt from Pitch Lake in the island of Trinidad, but it is claimed, and was found by the special term, that the defendants proceeded against were guilty of a violation of the last clause of the injunction order above quoted.

Other facts appear in the opinion.

A. M. Beardsley and Matteson & De Angelis, for defendants, appellants.

Charles D. Adams, for plaintiff, respondent.

HARDIN, P. J.—(1) It seems to be settled by authority that in cases of criminal contempt arising under sections 8 and 9 of the Code of Civil Procedure, the court has no power to impose costs.

In *People ex rel., etc., v. Gilmore* (88 N. Y., 626), it was said, viz.:

"A proceeding, however, to punish for such a contempt is a criminal proceeding, and the general term, on reversal of the order of special term, has no authority to impose costs upon the relator."

In *Stubbs v. Ripley* (39 Hun, 627), in considering an al-

Boone v. McGucken.

leged criminal contempt, it was held that the court "did not have power to impose upon the defendant \$10.00 [°] costs of the motion." In delivering the opinion in that case, DANIELS, J., said, in considering an alleged criminal contempt, viz.: "Authority to add these costs has not been given to the court by the section of the Code of Civil Procedure declaratory of the power of the court in the way of imposing punishment." The case from which the quotation has just been made was decided in the general term of the first department in 1886.

(2) In *Brinkley v. Brinkley* (47 N. Y., 40), it was held that contempt proceedings are special proceedings, and that an appeal lies from an order which is absolute [¶] in adjudging a person in contempt and prescribing punishment.

(3) In *People ex rel. Negus v. Dwyer* (2 N. Y. Civ. Pro. 370), it was held that an injunction order is a mandate, and is, therefore, included in that expression [¶] found in the sections of the Code of Civil Procedure relating to contempt. Section 14 of the Code of Civil Procedure.

(4) It has been repeatedly held that a party having knowledge of the existence of an injunction may be punished for violating it. *Mayor v. N. Y. & S. I. Ferry Company* (40 N. Y. Super. Ct., 300); S. C., aff'd (64 N. Y., 623); *People ex rel. King v. Barnes* (28 St. Rep. 625); *Aldinger v. Pugh*, 57 Hun, 181; 32 St. Rep., 513; S. C., affirmed 132 N. Y., 407; 44 St. Rep., 566. And it has also been held that a disobedience of an order by a party of which he had knowledge and which had been served on the solicitor, and not himself, may be punished as for a contempt. *People v. Brower* (4 Paige, 405); *Koehler v. Farmers' & Drovers' National Bank* (17 N. Y. Civ. Pro., 307). And the same is true, although the acts done in violation were upon the assumption that such acts could be safely done notwithstanding the injunction. *Gage v. Denbow* (49 Hun, 42); following *R. H. & L. R. R.*

Boone v. McGucken.

Co. v. N. Y. L. E. & W. R. R. Co. (48 *Hun*, 190). It [7] was held, however, in *Koehler v. Farmers' & Drovers' National Bank* (14 *N. Y. Civ. Pro.*, 71), "that unless personal service is made of an injunction order, that wilful and deliberate intent essential to constitute a criminal contempt is wanting."

(5) In *Duffus v. Cole* (15 *N. Y. Supp.* 628 S. C. 39 *St. Rep.*, 838), the question was presented to this court as to whether the defendant was properly convicted for [8] violating an order and injunction, and in the course of the opinion delivered it was said: "Again, the defendant was not liable for contempt unless her act might defeat, impair, impede or prejudice the right or remedy of the plaintiff. We are unable to see how her act in any way tended to do that. There was no proof of any loss to the plaintiff. 37 *Hun*, 329; 42 *id.*, 535; 4 *St. Rep.*, 657. We think the order should be reversed."

In *Rhodes v. Linderman* (17 *N. Y. Supp.* 628 S. C. 43 *St. Rep.*, 520), the case of *Duffus v. Cole* was referred [9] to approvingly in an opinion delivered by one of the members of this court.

(6) It was said in *Hawley v. Bennett* (4 *Paige*, 164), that so far as the rights of the party have been "affected by the breach of the injunction, it is no defense to [10] the person who has been guilty of violating the same that he did it under the advice of counsel; although, if he has acted in good faith, it may be sufficient to protect him from punishment as for a criminal contempt. The rights of parties must be protected against the wrongful acts of the adverse party, although he may have acted under the advice of counsel." The same doctrine [11] was approved by FOLGER, J., in *Erie Railway Co. v. Ramsey* (45 *N. Y.*, 654); to the same effect is *People v. Compton et al.*, 1 *Duer*, 512; affirmed 9 *N. Y.*, 263.

(7) It is provided in section 14 of the Code of Civil Procedure as follows: "A court of record has power to punish, by fine and imprisonment, or either, a neglect

Boone v. McGucken.

or violation of duty, or other misconduct, by which a [2] right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded or prejudiced, in either of the following cases." Then follows an enumeration of cases in eight subdivisions, and in the fourth subdivision it is provided that such punishment may be applied to a person for committing several enumerated acts, "and for any other unlawful interference with the proceedings therein."

In *People ex rel. King v. Barnes* (113 N. Y., 476), it was held that a party who had been convicted of contempt for advising and procuring one of the defendants to disobey [23] the judgment on the part of the officers of a corporation "was a civil contempt within the Code of Civil Procedure, section 14, subdivision 4." And it was also held, viz.: "Any person who interferes with the process, control or action of the court in a pending litigation, unlawfully and without authority, is guilty of a civil contempt if his act defeats, impairs, impedes or prejudices the rights or remedy of a party to such action or proceeding;" and the punishment of such a party, according to the provisions found in section 2285 of the Code of Civil Procedure, was upheld.

In *King v. Flynn* (37 Hun, 329), although the acts of the defendant were unlawful and contumacious, it was held that the case was within the provisions of title 3 of chapter 17 of the Code of Civil Procedure.

In *Dejonge v. Brenneman* (23 Hun, 233), it was alleged that an order of injunction was granted restraining the defendants from collecting rents, and that the violation thereof was charged as a contempt, and, in the course of the opinion, it was said: "It does not appear, from the papers submitted on the appeal, in what way the fine above mentioned was made up, and there does not seem to be any evidence to warrant its imposition. This is a civil contempt * * *."

Title 3 of chapter 17 of the Code of Civil Procedure

Boone v. McGucken.

relates to "proceedings to punish a contempt of court other than a criminal contempt;" and in section 2266 of the Code it is provided as follows: "In cases specified in section 14 of this act * * * and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offense must be punished as prescribed in this title." Then follow several sections relating to the practice; and in section 2281 of the Code of Civil Procedure it is provided as follows: "If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did defeat, impair, impede or prejudice the rights or remedies of the party to an action or special proceeding, brought in the court or before the judge or referee, the court, judge or referee must make a final order accordingly, and direct that he be punished by fine or imprisonment, or both, as the nature of the case requires." And in section 2285 of the Code of Civil Procedure it is provided what punishment may be inflicted, for "omission to perform any act or duty which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it," and then follows a provision in the section as follows: "In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time not exceeding six months, and until the fine, if any, is paid; and the order and the warrant of commitment, if any, must specify the amount of the fine and the duration of the imprisonment."

[14] In *Moffat v. Herman* (116 N. Y., 131), it was held that: "Under the provisions of the Code of Civil Procedure, sections 14, 2281, 2284, defining what is, and providing the punishment for, a civil contempt, the amount of fine which may be imposed must be based upon proof of the damages actually sustained."

In the case in hand it appears that a decision of the

Boone v. McGucken.

motion made by the plaintiffs to adjudge the defendants in contempt was made September 17, 1892, and signed by the judge presiding, which stated : "The motion made by the plaintiffs to adjudge the above-named defendants, Daniel McGucken and others, aldermen, and forming part of the common council of the city of Utica, in contempt for a violation of an injunction order issued in the above action and to punish them individually for the same, is granted, and a fine of \$200 is imposed upon each of said defendants, which when paid will be paid over to the county clerk of Oneida county, and an additional fine of fifteen dollars upon each of said defendants, which when paid will be paid over to the plaintiffs for their costs and disbursements in this proceeding as a punishment for said offense. An order will be entered in pursuance of the above containing all necessary provisions, and among others that each of said defendants stand committed to the jail of Oneida county until the fines imposed against him are paid."

Subsequently an order was prepared which contained the following language : "It is * * * found, upon the evidence presented, that the above-named defendants, Daniel McGucken (and others), are and each of them is guilty of contempt of this court, and that each of them has knowingly and wilfully disobeyed the injunction order which had been granted in this action and duly served upon them and set forth in the moving papers in full, in the following particulars and manner ;" then follows a quotation from the injunction order ; and thereafter the order contained the following : "The above-named defendants, while said order remains in full force and effect, did, as members of the common council of said city of Utica, jointly and severally and knowingly and wilfully, vote to let a contract or contracts to the Warren-Scharf Asphalt Paving Company to pave the several streets above mentioned with the best quality of Trinidad asphaltum to be taken and obtained from Pitch Lake in

Boone v. McGucken.

the island of Trinidad, and did participate in concluding, and in attempting to conclude, said contract or contracts with said Warren-Scharf Company. For the disobedience of said defendants to said order, as above found and stated, each of said defendants are adjudged guilty of contempt. It is further ordered and adjudged that for such acts of contempt the said defendants, Daniel McGucken, Robert Boyce, Charles P. Clark, Michael F. Corcoran, John L. Dowd, John E. Roberts, John Welch, and Joseph Tessy be, and they each are fined, and a fine is imposed upon each for the sum of \$200, which said fines, when collected, shall be paid to the county clerk of Oneida county.

“ And it is further ordered and adjudged that each of said defendants be and they are fined the further sum of \$15, which, when collected, shall be paid to the plaintiffs for their costs and disbursements in this proceeding. It is further ordered and adjudged that each of said defendants stand committed to the jail of Oneida county, in the city of Utica, until said fines imposed upon them are paid, or he is discharged, according to law. The proper process will be issued to the sheriff of Oneida county for the execution of this order. This order will be entered in the Oneida county clerk's office;” and it was signed by the judge presiding at the special term. The order does not contain any provision in pursuance of section 14, declaring that “ a right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded, or prejudiced ” thereby, or the equivalent; nor the language found in section 2281 of the Code of Civil Procedure, viz. : “ If it is determined that the accused has committed the offense charged, and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedy of a party to an action or special proceeding, brought in the court or before the judge or referee, the court, judge, or referee must make a final order accordingly, and directing that

Boone v. McGucken.

he be punished by fine or imprisonment, or both, as the nature of the case requires."

[¹⁵] In *Matter of Swenarton v. Shupe*, 9 *N. Y. Civ.*

Pro. 402, it was held, "That as the punishment exceeded that which the court was authorized to inflict by section 9 of the Code of Civil Procedure, for a criminal contempt, it was to be assumed that the proceedings were instituted under the provision of the Code authorizing the punishment of a person for a contempt in a civil action for misconduct by which a right or remedy of another may be defeated, impaired, impeded, or prejudiced. That assuming the order to have been made under such latter provisions, it was void because no adjudication was made that the misconduct complained of was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of the petitioner, or that the latter had sustained any loss or damage thereby."

[¹⁶] The doctrine of the above case was followed in *Dinsmoor v. Commercial Travelers' Association* (14 *N. Y. Supp.*, 676; 38 *St. Rep.*, 624). And in *Sandford v.*

Sandford (9 *N. Y. Civ. Pro.*, 289), it was held that "To

[¹⁷] punish a party for contempt in a civil proceeding, his conduct must be such as to defeat, impair, impede, or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed."

[¹⁸] In *Wheelock v. Noonan* (55 *Superior Court* [23 *J. & S.*], 305), section 2281 of the Code of Civil Procedure, was referred to, and a construction thereof was given in accordance with the views expressed by us in *Dinsmoor v. Commercial Travelers' Association*, *supra*.

[¹⁹] In *Fischer v. Raab* (81 *N. Y.*, 235) it was held :

"In proceedings under the provisions of the Code of Civil Procedure (section 14), to punish as a contempt an act of misconduct, or neglect of duty, in a civil action

Boone v. McGucken.

pending, it must be made to appear that the act or omission complained of is one 'by which a right or remedy of a party * * * may be defeated, impaired, impeded, or prejudiced,' and this must be adjudged to authorize the infliction of the punishment."

We think the decision and order to which reference has been made, pronounced by the special term, because they contained no such adjudication and determination as are provided for by sections 14, 2266, and 2281 of the Code of Civil Procedure, should not be sustained.

(8) The order to show cause recites that the summons and complaint, and the injunction, and all the papers on which the injunction was granted, were read. The [2^o] order made at the special term, brought here by appeal, does not recite the summons and complaint as having been read at special term when the order was made, and the appeal book does not contain the complaint.

It does contain, however, numerous affidavits in which it is stated by the defendants that they intended to comply with the injunction order, and to avoid any act which would in anyway in letter or spirit violate the same, and that all their acts were done openly, without any attempt at concealment, and that they had the advice of the city attorney that they were at liberty to perform the several acts which are alleged to be in violation of the injunction order, and that by such acts they would not violate the injunction order, and that they acted upon his advice, relying upon it and in good faith.

It was said in *People ex rel. Kelly v. Aitken* (19 Hun, 329) by the general term in the second department, viz.: "If, for example, one, after careful examination, wrongly interpret, and through this mistake disobey an order, the majesty of the law is not offended, nor the dignity of the court impaired; and, as he is innocent of willful offence, the infliction of punishment could have no justification. The willful disobedience, expressed in the statute, means

Boone v. McGucken.

conduct intentionally and designedly at variance with the mandate of the court."

The complaint of the plaintiff not being found in the appeal book, the full objects of the action are not ascertainable, although it is inferred that the action was begun by taxpayers under section 1925 of the Code of Civil Procedure to restrain waste.

In *Talcott v. The City of Buffalo* (125 N. Y., 280;) it was held that the remedy under that section "is confined to cases where the acts complained of are without power, or where corruption, fraud, or bad faith, amounting to fraud, is charged; the words 'waste' and 'injury' include only illegal, wrongful, or dishonest illegal action." And in *Ziegler v. Chapin* (126 N. Y., 348) *Talcott v. The City of Buffalo* was referred to in the following language: "We have quite recently declined to become arbitrators between taxpayers and their municipal officers in every instance of disagreeing opinions or conflicting judgments, and have decided that, jurisdiction in the officials existing, the courts can interfere in actions like that before us only where some fraud or collusion or bad faith is alleged and proved."

By reason of the absence of the complaint, and because the affidavits used at the special term are very conflicting, and by reason of the views already expressed, which lead to a reversal, we omit any comment upon the merits of the application, and rest our conclusion upon the views already expressed. We think the order appealed from should be reversed with costs.

Order and decision reversed, with one bill of costs.

MARTIN and MERWIN, JJ., concurred.

Estate of William C. Bell, Deceased.

ESTATE OF WILLIAM C. BELL, DECEASED.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
FEBRUARY, 1893.

§ 2749.

Sale of testator's real property to pay his debts—when may be ordered.

Where a will of real property gives a power of sale to the executors named therein, the exercise of which is discretionary, and not imperative, and does not expressly charge the real estate with the payment of the testator's debts, the surrogate's court has power to direct a sale of the real property for the payment of such debts.

In re Juch (17 N. Y. Supp., 910) distinguished.
(Decided February, 1893.)

Appeal by James H. Heroy and William W. Heroy, surviving partners, etc., from a decree of the surrogate of New York county, denying their petition, as creditors of William C. Bell, deceased, for an order directing a sale of his real estate for the payment of his debts.

The facts appear in the opinion.

Henry B. Johnson, for petitioners, appellants.

Thomas C Ennever, for executors, respondents.

O'BRIEN, J.—By their application to the surrogate the petitioners sought to enforce the sale of the real estate of which the decedent died seized, and have the proceeds thereof applied to the payment of their debts, pursuant to the provisions of the Code of Civil Procedure, by sec-

Estate of William C. Ball, Deceased.

tion 2749 of which "Real property of which a decedent died seized may be disposed of for the payment of his debts or funeral expenses, as prescribed in this title, except where it is devised expressly charged with the payment of debts."

In disposing of the application, the learned surrogate says: "It is only necessary to consider one question, viz., whether there is a power of sale in the will, which could be exercised for the payment of debts." And again he says: "The point to be decided is, whether a valid power of sale is created by the tenth clause of the will; and if there is a power of sale, whether it is one for general purposes, and, if exercised, whether from the proceeds arising therefrom the debts could be paid." After analyzing the provision of the will, and referring to two cases (*In re Powers*, 124 N. Y., 361; and *In re Estate of Juch*, 17 N. Y. Supp., 910), he thus concludes: "The case at bar would seem to be equally strong, if not stronger than the cases cited, as evidencing an intention on the part of the testator to give a discretionary power of sale to his executors, to be exercised by them, not only for purposes which might be favorable and profitable to the beneficiaries and legatees, but also for the purpose of paying his debts, should occasion arise therefor, viz., an inadequacy of personal property."

Upon this conclusion, that the power of sale was unlimited, and broad enough to include a power for the payment of debts, he denied the application, and from the order of denial this appeal is taken.

By the answer the executors alleged that, pursuant to the power of sale contained in the will, they had sold one of the pieces of real estate of which their testator died seized; but whether or not the proceeds arising therefrom would have been sufficient to pay the petitioners' claim is not alleged. As this allegation cannot be regarded as equivalent to a statement that there was sufficient personal property with which to pay the debts, it must be

Estate of William C. Bell, Deceased.

assumed upon this appeal, as no doubt it was by the learned surrogate, that this circumstance of a sale in no way affected the question which was presented, relating to the petitioners' right to the summary remedy provided by the Code for the application of the decedent's real estate to the payment of debts, the personal property being insufficient.

The testator, by his will, makes no mention of debts, nor does the will contain the usual direction for the payment thereof by the executors, being silent with reference thereto. After payment of certain bequests, he gives, devises, and bequeaths "all the rest, residue, and remainder of my real and personal estate, in trust," to executors, to take possession, manage, and control the same, receive the rents and profits therefrom, during the life of his wife. After her death, he gives, devises, and bequeaths all his estate, both real and personal, to his children, to six of whom their shares are given absolutely, and to the seventh a life interest, with a direction that upon the death of this child the one-seventh is to revert to and form part of the estate, and to be divided among the other children.

In addition to giving authority to the executors to collect and receive the rents, issues, and income of the estate, and to dispose of any of the personal property, by the tenth clause of his will he confers, with respect to his real estate, the following power upon the executors :

"Tenth. If, at any time, my executors, or such of them as shall have qualified, the survivors or survivor of them, shall deem it for the best interest of my said estate that any part or parts, or all of my real estate, should be sold, then I authorize and empower my executors, as such, and the survivors and survivor of them, to sell and dispose of any real estate of which I may die seized or interested in, and any part or parts thereof, upon such terms and in such manner as they shall deem best, and for that

Estate of William C. Bell, Deceased.

purpose to make, execute, and acknowledge all necessary deeds of conveyance therefor."

It will thus be seen, from a reading of the will, that the testator did not devise any part of his real estate expressly charged with the payment of debts, nor was there any imperative direction to the executors to change the character of his estate as he left it; but the real estate was devised to his wife for life, with remainder over to his children, subject to being divested by the execution of the power of sale conferred upon the executors.

Whether or not, under the provisions of such a will, a general power of sale, such as is here given, will prevent the enforcement of the summary right of a creditor to have the real estate applied in payment of debts, can best be determined by resort to some of the cases showing the principles upon which the decisions in those cases proceeded.

In the first class may be grouped those wherein by the will the real estate is devised, expressly charged with the payment of debts. There the Code governs, and would prevent the creditors enforcing a sale of the real estate.

Another class, directly opposite, is where the estate is devised, and no intention to charge the debts upon the same is shown, resort may be had to the real estate. Thus, in *Matter of McComb* (117 N. Y., 378) it was held that a discretionary power of sale of real estate given to executors for the benefit of devisees, with a direction to apply the proceeds to their use, may not be converted into a power of sale to pay debts; that the doctrine of equitable conversion is not applicable to such a case.

Under a third head may be grouped a class of cases like the one referred to by the learned surrogate (*In re Powers, supra*) and *Erwin v. Loper* (43 N. Y., 520), where the principle has been applied that where executors, under power of sale given by the will, sell real estate, the avails become assets in their hands for the payment of

Estate of William C. Bell, Deceased.

debts and legacies, and to be accounted for the same as any other assets; the residue, after payment of legacies and debts, belongs to the devisees to whom the lands have been devised, subject to the executors' power of sale.

It will thus be seen that the distinction between the cases last referred to and the class of cases like that of McComb is due to the fact that in the McComb case a discretionary power of sale was to be exercised for the benefit of devisees; whereas, in the class under which fall the cases of *Erwin v. Loper* and *In re Powers*, the power of sale was general and unrestricted, being given for the purposes of paying off incumbrances, protecting the real estate, or more equitably or conveniently dividing it, and which had by executors been exercised, leaving in their hands the resultant funds, which, in the course of administration, could be applied to the payment of debts. In one class there is a devise of real estate in specific parcels; but in the other class, where the real estate is not specifically devised, and a general unrestricted power of sale is given, which is exercised, and the property sold, the proceeds arising therefrom are applicable to the payment of debts. Under the latter head may be cited the cases referred to in the Matter of McComb (117 *N. Y.*, at p. 383), as follows: "In *Glacius v. Fogel* (88 *N. Y.*, 444) the entire real estate was devised to the executors, who were to divide and distribute the proceeds. The sales were for the benefit of the estate and of its purposes, and not for the sole benefit of the devisees. In *Hood v. Hood* (85 *N. Y.*, 561) the real estate again was devised to the executors, in trust; to sell and hold and distribute the proceeds as money. * * * In *Kinnier v. Rogers* (42 *N. Y.*, 531) the court added that, since there was no ground for an inference that the testator intended to appropriate his land to the payment of debts, the power of sale could not be exercised for that purpose."

Although here the real estate was devised, subject to being divested by the exercise of the discretionary power

Estate of William C. Bell, Deceased.

vested in the executors, we are inclined to think that, had such power been exercised and the property sold, and had the executors, in answer to the application of the creditor, shown that they held the proceeds of the real estate which could be administered upon and the debts paid, then the case and principle would be covered by the class of cases to which reference has been made of *Erwin v. Loper* and *In re Powers*. Here, however, assuming that the personal property and the proceeds of the piece of real estate sold were insufficient to pay debts, the question is thus presented whether the creditor can enforce the sale of other real estate by proceedings under the statute.

In re Juch's Estate (In re Gantert, supra), this court held that, where the power of sale is unlimited and unrestricted to any particular purpose, and is broad enough to include a power for the payment of debts, and there being a valid power of sale for that purpose, the proceeding cannot be maintained. In that case, decided by the court of appeals November 29, 1892 (*Law Journal*, Nov. 30, 1892), it was said: "A power of sale to pay debts sufficient to defeat the creditor's application under the statute must be one the exercise of which is imperative, and not simply discretionary. A creditor cannot be deprived of his statutory remedy unless the debtor has, by his testamentary act, provided him with one that is equally prompt and effective in its operation." And again: "It is conceded that he is entitled to the relief sought unless the testator's real property is, by the terms of the will, subject to a valid power of sale for the payment of debts."

As we have seen, the testator in his will here makes no mention of or provision for his debts whatever, and as to his real estate, his intention was that it should be kept by his executors during the lifetime of his wife, she to reside in a portion of it, and that the income should be used to pay for the support of his family, and upon the death of the wife that the real estate and personal prop-

Estate of William C. Bell, Deceased.

erty should go to his children, the personal property as personal property and the real estate as real estate. The power of sale is expressly discretionary, and the creditors could not, for their benefit, insist upon its exercise.

In re Juch, the decedent in his will directed his executors to pay his debts and funeral expenses, whereas in this case we find no reference whatever to debts. And if importance is to be attached to such a provision in a will, we do not see why the absence of such a provision should not be equally as significant. In that case it is said: "We cannot regard the direction to the executors and trustees to pay all just debts as an idle and meaningless formula. The testator well knew that his will in this respect could not be obeyed without a sale of some part of his real estate; and it is to be presumed that he intended to clothe them with a power commensurate with the duties imposed upon them. The real and personal property is blended in one gift to the executors for a common trust, in which all the beneficiaries share equally. The exercise of a general and unlimited power of sale is imperative, and may be compelled in favor of any party who is lawfully entitled, under the provisions of the will, to the proceeds of the real property when sold. A creditor whose debt is directed to be paid by the will belongs to this class. As to him it becomes a power in trust, and the court decides that 'the petitioner' (a creditor) as a beneficiary of the power, can compel its execution, and, therefore, that he has no right to the summary remedy of the Code."

Applying this reasoning to the right of the petitioners here, we think the error into which the learned surrogate has fallen is in formulating the question for determination, and in not noting the distinction between a discretionary and an imperative power of sale. He made the right of a creditor to a sale of the real estate under the statute to depend upon the question whether the power of sale in the will *could* be exercised for the payment of

Estate of William C. Bell, Deceased.

debts. We think the more correct expression to be, that the question for determination was whether there is a power of sale in the will, which *must* be exercised for the payment of debts. And that, therefore, though a power of sale may be general and unrestricted, which, if exercised, might render the proceeds of real estate, if an intention to that effect could be reasonably inferred from the will, subject to be applied to the payment of debts; such a discretionary power of sale, unexercised, and in the absence of any provision in the will for the payment of debts, or an expression of intention from which it could be inferred that the real estate must be sold for the payment thereof, is not sufficient to prevent creditors for enforcing payment of their debt by compelling a sale of the real estate, where all the jurisdictional facts are shown, and all the proceedings have been regular and in accordance with the Code, as was concededly the position of the petitioners here.

We think that this view is sustained by the Code, which makes provision for such an application, except in cases where the decedent has provided a way of payment by charging the debt on the real property, or by giving his executors a power of sale for the payment of debts that can be enforced. This is but saying that a disposition of real estate in the summary manner provided by the Code must be granted, unless the creditor is provided with another method of enforcing payment.

Having reached the conclusion that the power of sale under this will was not one for the benefit of creditors of the estate, or one which they could have enforced, it was a proper case for the application to the surrogate, which could only be denied upon a showing that the executors had sold the real estate, and were in funds sufficient to pay the debt.

We are of the opinion, therefore, that the order of the surrogate should be reversed, with costs, with leave to the executors to answer over with a view of showing whe-

Estate of William C. Bell, Deceased.

ther the proceeds from the one piece of property sold would leave sufficient assets in their hands out of which the debt could be paid, in which event the application should be denied; otherwise, granted.

VAN BRUNT, P. J. (concurring).—While agreeing in the result of the within opinion, I do not concur in much that is contained therein.

The learned surrogate says: "It is only necessary to consider one question, viz.: whether there is a power of sale in the will which could be exercised for the payment of debt." It seems to me that that is not the question, but it is, Has this real estate been devised *expressly* charged with the payment of debts, not charged by implication, or by operation of law, but *expressly* charged? Such is the provision of section 2749 of the Code. Unless it has been so expressly charged, this section gives the creditor the right to maintain this proceeding. In the case at bar the will contains no reference to debts, no direction to pay, hence, although there may be a legal obligation upon the part of the executors to pay, there is no charge of payment expressed in the will, hence the debts are not expressly charged with the payment of anything.

In re Juch, referred to, the will expressly charged the executors with payment of debts, and it was held that all the assets of the estate, there being a power of sale, were charged with their payment, a very different case from the one at bar.

BARRETT, J. (concurring).—I concur, upon the ground that the real estate was not charged by the testator with the payment of debts, and that the power of sale was discretionary, and not imperative.

CAREY *et al.*, RESPONDENTS, v. BROWNE, APPELLANT.

SUPREME COURT, THIRD DEPARTMENT, GENERAL TERM,
FEBRUARY, 1893.

§ 783.

Judgment by default—when opened—service of copy of proposed answer.

Where, upon a motion to open judgment taken by default, and for leave to serve an answer, it was shown by affidavit that within a short time after the service of the summons the defendant was taken seriously ill, and remained so for about five weeks, during most of which time he was compelled to remain in a dark room because of some disease of his eyes; that while in that condition he lost the summons, and when recovered, wrote plaintiff's attorney for a copy thereof, but received no response until the execution issued upon a judgment taken by default was presented to him by the sheriff—*Held*, that the defendant had so far excused his default as to entitle him to be let in to defend the action.

Where, upon a motion to open judgment taken by default, and for leave to serve an answer, the affidavit shows the nature of the defence and the good faith of the party in asking to defend, his apparent default should be opened, notwithstanding a copy of the proposed answer was not served with the motion papers.

While the granting or refusing of a motion to set aside judgment and permit a defendant, against whom judgment has been taken by default, to answer, is to a great extent a matter of judicial discretion to be exercised by the special term, the exercise of that discretion in the favor of the judgment creditor should not be without regard to the property and rights of the party who has not had his day in court, and who excused his default.

(*Decided, February 15, 1893.*)

Appeal by the defendant from an order of the special term denying a motion made by him to open a judgment

Carey v. Browne.

taken by default against him, and for leave to serve an answer.

This action was brought by Mary Carey, as administratrix, and August Stumpel, as administrator, of the property of Frank Carey, deceased, to recover damages for the alleged conversion by the defendants of an oil painting entitled, "The Birth of Venus," the title to which, it is alleged by the plaintiffs, was in their decedent at the time of his death. The summons was duly served upon the defendant, and he failed to appear or answer, and judgment by default was taken against him for the sum of \$553.34. Thereafter he moved to open the default, setting forth in his moving papers that he purchased the picture in question from Stephen M. Carey, brother of the plaintiffs' decedent; that he paid \$350 for it, and that it never belonged to the plaintiffs, or their decedent.

The facts appear in the opinion.

Foley & Wing, and Magner & Hughes, for defendant, appellant.

H. Dunkel, for plaintiff, respondent.

MAYHAM, P. J.—The affidavits on this motion disclose that the defendant was served with a summons in this action without a complaint, and that a short time after such service he was taken seriously ill, and remained in that condition for about five weeks, during most of the time compelled to remain in a dark room by reason of some disease of his eyes; that while in that condition he lost the summons, and as soon as he was sufficiently recovered he wrote plaintiffs' attorney for a copy of the summons, but got no response until presented by the sheriff with an execution issued upon the judgment obtained by default in the action. I think the defendant so far excused his default as to entitle him to be let in to defend this action on terms. The defendant, in his affidavit, states facts in addition to the affidavit of merits,

Carey v. Browne.

which show that he purchased this picture, and paid for it, of the person in whose possession it was; and while on a trial it may turn out that the person of whom he purchased it was not the true owner, and had not the right to sell the same, yet I think he should, if he desire, have the opportunity of litigating that question, and that he has sufficiently excused his default to entitle him to relief under section 783 of the Code of Civil Procedure. On the whole proof on this motion the title to the picture in controversy is by no means free from doubt, and while the granting or refusing a motion to set aside a judgment is to a great extent a judicial discretion, to be exercised by the special term, the exercise of that discretion in favor of the judgment creditor should not be without due regard to the protection of the rights of the party who had not had his day in court, and who excuses his default. *Fassett v. Tallmadge*, 15 *Abb. Pr.*, 206; *Bank v. Gifford*, 40 *Barb.*, 659; *Ellsworth v. Campbell*, 31 *Barb.*, 134. It is not absolutely necessary to serve with motion papers to open a default; the proposed answer, if sufficient, appears in the affidavit to show the nature of the defence, and the court can see the good faith of the party in asking to defend. *Palmer v. Van Orden*, 49 *N. Y. Super. Ct.*, 89. No injustice can be done the plaintiff by allowing the judgment to stand, and at the same time permitting the defendant to come in and defend on such terms as will indemnify the plaintiff for all steps taken by her after the default. The defendant may answer in this case upon payment of all costs and disbursements after defendant's default, which are included in the judgment, and \$10 cost of this motion and printing disbursements and serving an answer herein, within twenty days after the announcement of this decision; the judgment already entered to stand as security, and on compliance with above conditions the order of special term appealed from is reversed.

PUTNAM and HERRICK, JJ., concurred.

Carling v. Percell.

CARLING v. PERCELL.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
MARCH, 1893.

§§ 1341, 3192.

*Appeal to the Court of Common Pleas from City Court of New York—
security.*

To perfect an appeal to the court of common pleas from a judgment of the city court of New York, the appellant must give the security which was required to be given on appeal from an inferior court to the supreme court by section 1341 of the Code of Civil Procedure, as it was originally enacted, which is the same security as is required to perfect an appeal to the court of appeals.

It is a rule governing the interpretation of statutes, that statutes which expressly or by necessary implication adopt another, must be deemed to have incorporated the statute adopted *ipsissimis verbis*, and that future additions to or modifications on the latter are not included in the adoption unless a contrary intention is clearly manifested.

At the time of the enactment of section 3192 of the Code of Civil Procedure, in May, 1880, providing the titles first and third of chapter 12 of the code governed appeals taken from the city court of New York to the court of common pleas, section 1341, contained in article "third" of said chapter, required the giving of security to perfect an appeal from a judgment, and, therefore, such security must be given to perfect such an appeal, notwithstanding section 1341 has since been amended so as not to require such security, since there is nothing in the amendatory statute which indicates an intention that the modification of section 1341 shall apply to section 3192.

An order of the special term of the court of common pleas dismissing an appeal to that court from a judgment of the city court of New York is not appealable, since it does not affect a substantial

Carling v. Percell.

right, the appeal dismissed being ineffectual and a nullity because of the failure to give security to perfect it, and an appeal from such an order should be dismissed.

(Decided March 14, 1893.)

The appeal by the plaintiff from an order of the special term, dismissing an appeal taken by the plaintiff from a judgment of the general term of the city court.

The facts appear in the opinion.

Thomas D. Farrell, for plaintiff, appellant.

Edward W. S. Johnston (*Johnston & Johnston*, attorneys), for defendant, respondents.

BISCHOFF, J.—Plaintiff sought to appeal to this court from a judgment of the general term of the city court of New York, which affirmed a judgment for defendant. To that end he served his notice of appeal, but did not give the security required to perfect the appeal by section 1341 of the Code of Civil Procedure before its amendment by chapter 450, Laws of 1890. Defendant thereupon, under the provisions of rule 11 of the special rules, applied to this court at special term, and on notice to plaintiff, for an order dismissing the appeal. This order was granted, and from it the present appeal is attempted to be taken.

Section 1341 of the Code of Civil Procedure, as originally enacted (see chapter 431, Laws 1876), provided that upon an appeal to the supreme court from an inferior court security must be given to render it effectual, and the security intended is the same as provided for in case of an appeal to the court of appeals. Code Civil Proc. § 1326; *Lane v. Humbert* (*Com. Pl. N. Y.*); 9 *N. Y. Supp.*, 744. Sections 3191-3194 regulate appeals from the city court of New York to this court, and section 3192 declares that titles 1 and 3 of chapter 12 of act of

Carling v. Percell.

1880, c. 178 (comprising sections 1293-1323, 1340-1345), shall be applicable to such appeals, except as sections 3193, 3194, may otherwise prescribe. By section 7, ch. 450, Laws 1890, section 1341 of the Code of Civil Procedure was so amended as to dispense with security to perfect an appeal to the supreme court from an inferior court, and the query is, whether or not this amendment applies to appeals from the city court of New York to this court. It is a rule which governs the interpretation of statutes that a statute which expressly or by necessary implication adopts another, must be deemed to have incorporated the statute adopted *ipissimis verbis*, and that future additions to, or modifications of, the latter are not included in the adoption, unless a contrary intention is clearly manifested. Suth. St Const. § 257; End. Interp. St., p. 115, § 85: Knapp v. Brooklyn, 97 N. Y., 520; *In re Main street*, etc., 98 N. Y., 454.

Section 1341 of the Code of Civil Procedure, at the time of the enactment of section 3192 (May 6, 1880), required security to render the appeal effectual, and, as the last-mentioned section contains nothing from which an intention to include future additions to, or modifications of, section 1341 in the adoption, is inferable or apparent, the rule of interpretation referred to precludes the application of the amendment which dispenses with the security to appeals from the city court of New York to this court. Hence, to render such an appeal effectual, security must still be given. Pursuant to the provisions of section 1347 of the Code of Civil Procedure, an appeal to the general term of a superior city court, of which this court is one (section 3343, subd. 1), from an order made at special term, can only be taken when the order (1) grants, refuses, continues or modifies a provisional remedy; (2) grants or refuses a new trial; (3) involves some part of the merits; (4) affects a substantial right; (5) in effect determines the action and prevents a judgment from which an appeal might be taken; or (6) determines

Hecla Consolidated Mining Co. v. O'Neill.

a statutory provision to be unconstitutional. Clearly, the order dismissing the appeal is not among the cases provided for, unless it may be successfully claimed that it affects a substantial right. But the effect of the omission to give the required security was to render the appeal ineffectual, and the notice of appeal to this court a nullity. *Raymond v. Richmond*, 76 N. Y., 106; *Manufacturing Co. v. Thayer*, 82 N. Y., 610. No appeal was pending; the order dismissing it was unnecessary; no right whatever of the plaintiff was involved, and the order was for that reason not appealable.

The appeal should, therefore, be dismissed, with costs.

DALY, Ch. J., and PRYOR, J., concurred.

HECLA CONSOLIDATED GOLD MINING COMPANY, RESPONDENT, v. O'NEILL, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
FEBRUARY, 1893.

§§ 1010, 3262, *et seq.*

Demurrer—entry of judgment after default in amending, as permitted by interrogatory judgment—equitable action—taxation of costs.

Where, in an equitable action, a demurrer to the defendant's answer was sustained, and an order and interrogatory judgment were duly entered, directing the entry of final judgment for the relief demanded in the complaint, with costs, unless the defendant serve an amended answer and pay certain costs, the plaintiff may, without any further application to, or direction from, the court, upon the defendant's failure to pay such costs, and answer as so permitted, enter final judgment. There was a suffi-

Hecla Consolidated Gold Mining Co. v. O'Neill.

cient application to the court for judgment upon the trial of the demurrer.

Where costs are inserted in a judgment without taxation, it is simply an irregularity upon the part of the clerk, which must be corrected upon motion, and the objection cannot be taken upon appeal from the final judgment.

(Decided February 17, 1898.)

Appeal by the defendant from the final judgment sustaining a demurrer to his answer, with costs.

VAN BRUNT, P. J.—This action was commenced to procure equitable relief against the defendant. A demurrer was interposed to the defendant's answer, which was duly sustained, and an order and interlocutory judgment were duly entered, directing the entry of final judgment for the relief demanded in the complaint, with costs, unless the defendant should serve an amended answer and pay certain costs within ten days. The defendant appealed from the interlocutory judgment so entered to the general term, and subsequently, the defendant having failed to serve an amended answer, or pay the costs, or stay the plaintiff pending his appeal from the interlocutory judgment, a final judgment was entered for the relief demanded in the complaint, and from this final judgment this appeal was taken.

The grounds which are presented upon this appeal are—First, that the clerk had no jurisdiction to enter a judgment without an application having first been made to the court; and, second, that the costs which were inserted in the final judgment were not taxed or adjusted by the clerk in any way, as required by the provisions of the Code. It is urged that, this being an equitable action, and not one on contract, the plaintiff was not entitled, as of course, to final judgment, without the direction of the court for such judgment against the defendant upon an alleged default; and it is claimed that there was in fact no such direction; and, further, that there

Hecla Consolidated Gold Mining Co. v. O'Neill.

was no direction that the plaintiff was entitled to costs. Upon an examination of the record, it will appear that these points are manifestly not well taken. Upon the trial of the demurrer, there was an application for judgment, because of the insufficiency of the answer; and the court, having held the answer to be insufficient, by sustaining the demurrer, directed an interlocutory judgment by which the demurrer was sustained, with leave to amend upon terms, and, in default of such amendment, directed judgment to be entered for the relief demanded in the complaint, with costs as taxed. This seems to have been a compliance with the provisions of the Code regulating the practice in cases of this description.

The point as to the taxation of costs cannot be raised upon appeal from the final judgment, for the simple reason that the proceedings upon the taxation of costs formed no part of the judgment roll; and, if the costs were inserted without taxation, it was simply an irregularity upon the part of the clerk, which must be corrected upon motion. There would seem, therefore, to be nothing raised upon this appeal which in any way interferes with the validity of the final judgment as entered. The judgment should be affirmed, with costs.

O'BRIEN and FOLLETT, JJ., concurred.

* In 22 *N. Y. Civ. Pro.*, p. 425, will be found a copy of the findings in *Thompson v. Stanley*, which Mr. Justice ANDREWS, sitting at special term of the supreme court in New York county, held in that case to be in proper form (see 22 *N. Y. Civ. Pro.*, 421). He says in his opinion in that case that the decision filed on the trial of a demurrer should direct the final or interlocutory judgment to be entered, but should not direct both. This is not so since the amendment of section 1021 of the Code of Civil Procedure by Laws of 1879, chap. 542. That section, before the amendment, read as follows:

"§ 1021. The decision of the court, or the report of a referee, upon the trial of a demurrer, must direct the judgment to be entered thereupon, or other disposition of the cause, as prescribed in section 1018 of this act."

Brassington v. Rohrs.

BRASSINGTON, RESPONDENT, v. ROHRS, IMPEADED
WITH NYLIN, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
APRIL, 1893.

§§ 538, 542, 779, 3232, 3333.

Notice of trial—effect on right to serve demurrer to answer, or move for judgment on sham answer—interlocutory judgment on demurrer.

A plaintiff in an action may disregard a notice of trial served by himself, and one served by the defendant, and demur to the latter's answer, if such demurrer is served in time. The notices of trial must be deemed to have been given and received in subjection to the exercise of such a right.

Clifton v. Brown (2 *N. Y. Civ. Pro.*, 44) ; *Duyceck v. N. Y. El. R. Co.* (5 *Id.*, 22) followed.

The right to make a motion to strike out an answer as sham is unaffected by a notice of trial given or received before the expiration of the time limited for the exercise of the right.

The fact that new matter, set up in an answer as a "further defense," is not stated to be a separate defense, and is not separately numbered, is no reason for overruling a demurrer thereto.

An allegation in an answer to the complaint in an action on a note, that the note was given to the payee named therein for accommodation only, and without consideration, is new matter, and may be demurred to.

The amendment made it read as follows, the new matter being indicated by italics :

"§ 1021. The decision of the court, or the report of a referee, upon the trial of a demurrer, must direct the *final* or *interlocutory* judgment to be entered thereupon. *Where it directs an interlocutory judgment, with leave to the party in fault to plead anew or amend, or permitting the action to be divided into two or more actions, and no other issue remains to be disposed of, it may also direct the final judgment to be entered if the party in fault fails to comply with any of the directions given or terms imposed.*"

Brassington v. Rohrs.

An answer denying that the payee in a note transferred it to the plaintiff in the action, and alleging that such payee is still the holder of it, is properly stricken out as sham, upon the payee's affidavit that he transferred it to the plaintiff for value.

A denial in an answer in an action on a note, that the plaintiff is the "holder of the note for value," does not deny that he is the owner of it, and does not put in issue any material allegation of the complaint.

An interlocutory judgment, sustaining a demurrer to a part of an answer, may properly award costs to the successful party, and provide for execution for the collection thereof.

(Decided April, 1898.)

Appeal by defendant from interlocutory judgment, sustaining demurrer to part of his answer; from an order denying motion to set aside such judgment, and from an order for judgment on answer as frivolous, made after part of it had been held insufficient on demurrer.

The opinion states the facts.

Henry Wehle, for defendant, appellant.

Charles I. Hardy, for plaintiff, respondent.

J. F. DALY, C. J.—The defendant's principal grievance seems to be that after both parties had noticed the cause for trial upon the answer served, the plaintiff disregarded such notice on his own part as well as his adversary's, and proceeded to demur to one portion of the answer, and, after obtaining judgment in his own favor as to that, moved to strike out the rest of the answer as sham, and so disposed of the whole defense before the term for which the case was originally noticed.

It seems to be clear, under the authorities, that the plaintiff might disregard his own notice of trial and his adversary's, and demur to the latter's answer, if such demurrer were served in time. It has been held that the

Brassington v. Rohrs.

plaintiff might serve an amended complaint within the time allowed for amendment, of course notwithstanding that he and his adversary had exchanged notices of trial upon a demurrer to the original complaint (*Clifton v. Brown*, 2 *Civ. Pro.*, 44, gen. term, first dep't), and that the defendant might serve an amended answer within the time allowed by law, notwithstanding both parties had noticed for trial the issues raised by the first answer (*Duycinck v. N. Y. El. R. R. Co.*, 5 *N. Y. Civ. Pro.*, 22 *N. Y. supreme court*, general term).

There is absolutely no difference in principle between these cases and the one before us. Here the plaintiff demurred to the answer within the time allowed by law, and the notices of trial must be deemed to have been given and received in subjection to the exercise of such a right as well as the right to amend. The same reasoning upholds the practice of the plaintiff in moving to strike out the remaining portion of the answer as sham. The right to make such a motion must be deemed to be unaffected by a notice of trial given or received before the expiration of the time limited for the exercise of the right. The city court was, therefore, justified in disregarding the objections to proceeding upon the demurrer or upon the motion, such objections being founded solely upon the prior notice of trial.

The plaintiff's demurrer to the second defense contained in the answer, was properly sustained. The defendant's contention is, that the matter demurred to did not constitute a separate defense. But the matter is described in the answer as a "further defense," and the fact that the defendant has not separately numbered it is not controlling upon his adversary. His failure to comply with the code in that respect cannot be urged in his own favor. While the words, "for a further defense," are not controlling where the matter it precedes is not in fact a separate defense (*Thompson v. Kearney*, 12 *St. Rep.*, 682), yet here there can be no doubt of the subject. The first

Brassington v. Rohrs.

defense is a denial that the plaintiff is the holder of the note for value, and an averment that the defendant Nylin is still the owner thereof. The second defense is, that the note was given to Nylin for accommodation only, without consideration. The latter is new matter set up as a defense, and is wholly separate from the denial in the first paragraph. As the appellant does not attempt, in his brief on this appeal, to argue that the matter demurred to constitutes a defense, it is not necessary to discuss that question. He puts his sole objection to the judgment on the ground that the matter demurred to did not attempt to set up a separate defense. But in this we cannot agree with him.

After the judgment upon the demurrer had disposed of part of the answer, the remainder, which denied that the plaintiff is the holder of the note for value, and averred that defendant Nylin was still the owner thereof, was struck out as sham, upon the affidavit of defendant Nylin, in which he deposes that he did, for value received by him, before the maturity of the note, indorse and transfer it to the plaintiff; that the note was not made for accommodation, but given to him by defendant Rohrs, in payment of an indebtedness incurred for work in stair-building, which he had done for defendant, Rohrs, on buildings on Madison avenue; that the deponent was indebted to plaintiff for materials supplied him in building the aforesaid work for Rohrs, and also received some cash at the time of indorsing and delivering the note. It therefore appears that this defendant's answer set up matter which he did not, and could not, know to be true at the time that the answer was interposed, viz., that the endorser Nylin was still the owner of the note. The denial that the plaintiff was the "holder of the note for value" does not deny that the plaintiff was the owner of the note, and therefore does not put in issue any material allegation of the complaint. The affirmative allegation that Nylin is still the owner of the note is conclusively disproved by

Squire v. McDonald.

Nylin's affidavit, to which the defendant, Rohrs, made no reply.

After the entry of the interlocutory judgment for costs upon the demurrer, the defendant moved to set the same aside on the ground that it was unauthorized. No irregularity was stated in the order to show cause, but the affidavit complained that the final judgment for costs had been entered, which was claimed to be irregular. The motion was denied. The judgment as entered expressly provides that it is an interlocutory judgment, and not a final one. Had it been a final judgment it would have provided for the recovery of the demand in the complaint. The objection seems to be that the costs were taxed and included in this interlocutory judgment, but this is exactly what the code allows (sec. 3232; *Adams v. Wood*, 60 *How. Pr.*, 288). The interlocutory judgment provides for execution for the collection of the costs. This also is authorized (Code, sec. 3233, 779).

The judgment and orders appealed from must be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

SQUIRE, RESPONDENT, v. McDONALD *et al.*, APPELLANTS.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
FEBRUARY, 1893.

§ 559.

Undertaking to procure order of arrest—liability of sureties.

Where an order of arrest has been vacated on motion on the merits and the time to appeal from the order vacating it has expired, the person arrested thereunder may maintain an action on the

Squire v. McDonald.

undertaking given to procure the order of arrest to recover damages for the arrest, notwithstanding the action in which it was issued is upon a cause of action identical with the ground of arrest, and has not yet been tried and determined.

Schuyler v. Englert (10 *Daly*, 463); Rothwell v. Paine (9 *N. Y. Civ. Pro.*, 128), distinguished.

(Decided, February 6, 1893.)

Appeal by defendants from a judgment entered in favor of the plaintiff upon a verdict rendered by direction of the court.

The opinion states the facts.

T. D. Kenneson (*Kenneson, Crain & Alling*, attorneys), for defendant, appellants.

William R. Wilder (*Rudd, Hunt & Wilder*, attorneys), for plaintiff, respondent.

BISCHOFF, J.—Plaintiff sued upon an undertaking given to obtain an order for his arrest in an action by one Homer Lee, pending in the supreme court, to recover damages for the alleged conversion of personal property, which was to the effect required by section 559 of the Code of Civil Procedure, that “the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest,” not exceeding the amount specified, “if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest.” At the time of the commencement of this action the supreme court action remained undetermined, but the order of arrest therein had, on motion, been duly vacated and set aside on the merits, and an order to that effect entered, which, by expiration of the time limited for appeal therefrom, had become final. Appellants’ only contention against the validity of the judgment appealed from is that the

Squire v. McDonald.

action on the undertaking was prematurely brought because no final decision had been had that plaintiff in the supreme court action was not entitled to the order of arrest therein invoked, and that his right to the order of arrest may yet be determined if the last-mentioned action should eventuate in a judgment in plaintiff's favor, since the cause for arrest arises under section 550 of the Code of Civil Procedure, and is identical with the cause of action.

This contention, however, disregards the clear import of the language of the undertaking. It is not that the plaintiff therein named will pay if it is finally decided that he was not entitled to *an* order of arrest, but that he will pay if it is finally decided that he was not entitled to *the* order of arrest. Which order of arrest? Plainly, the one invoked, and with immediate reference to which the undertaking was given. This was vacated on the merits, and cannot be reinstated by an eventual judgment for plaintiff in the same action, though such a result would determine that plaintiff was entitled to *an* order of arrest. There can, of necessity, therefore, be no distinction concerning the finality of the decision that plaintiff was not entitled to *the* order of arrest, between orders vacating an order of arrest on the merits, the time to appeal from which has lapsed, because in the one instance the cause for arrest was collateral to the cause of action, and in the other it was identical therewith. Code of Civil Procedure, sections 549, 550.

Nor has the question under discussion been determined at variance with the views above expressed in the cases cited on appellants' behalf. *Schnyler v. Englert*, 10 *Daly*, 463, and *Rothwell v. Paine*, 9 *Civ. Pro.*, 128. In neither was the question before the court for review. Both were apparently cases wherein the cause for arrest was collateral to the cause of action, the former actually and the latter constructively so; and whatever the court may have said in its opinions concerning cases wherein

Collins v. Jewell.

the cause for arrest and the cause of action were identical was *dicta* merely, and without the force of decision.

The judgment appealed from should be affirmed, with costs.

DALY, Ch. J., and PRYOR, J., concurred.

COLLINS v. JEWELL, RESPONDENT, COLLINS AS EXECUTOR, ETC., APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, APRIL, 1893.

§ 757.

Order granting motion to revive action which survives upon the death of sole plaintiff should be granted in the discretion of the court when certain facts are shown.

The fact that a cause of action may seem unmeritorious and has been delayed many years prior to the death of the plaintiff, cannot be considered upon a motion by the executor of the plaintiff's estate to revive and continue the action made after the plaintiff's death, and where the delay of the executor in making the motion has not been great and has not been shown to have been injurious to the defendant, and the executor should not be required to give security for costs as a condition for granting the application.

(Decided April, 1893.)

Appear by John Collins as executor of the estate of Maria Collins, deceased, from an order that this action brought by her be continued in his name unless within ten days he deposit \$250 or give an undertaking in that amount as security for the defendant's costs.

Collins v. Jewell.

The facts are stated in the opinion.

A. M. Card, for John Collins as executor, etc., appellant.

Thomas E. Steward, for defendant, respondent.

SEDGWICK, J.—The cause of action stated in the complaint has survived the death of the plaintiff. It is not an equitable action. It is one at common law. Whether motions of this kind must be granted rests in the discretion of the court, when certain facts are shown. The facts of this case do not justify the denial of the motion. That the cause of action may seem unmeritorious is not of weight on the motion. That is to be determined by a trial. That the action has been for many years delayed to the time of the death of plaintiff, on Jan. 7, 1892, cannot be considered. The defendant could, if the delay were not justified, have procured a dismissal of the action. No effects from this delay could reach the executor. The delay of the executor is not great, and has not been shown to be injurious to defendant. This being the case, I do not think the application should have been denied, except upon condition of security for costs. No reasons having been shown why the executor should not be allowed to continue the action, a condition of his doing so should not have been imposed.

Order reversed, and motion below granted, with costs of appeals.

FREEDMAN and McADAM, JJ., concurred.

Leonard v. The Germania Fire Insurance Co.

LEONARD v. THE GERMANIA FIRE INSURANCE
COMPANY.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
FEBRUARY, 1893.

§ 1002.

New trial—when not granted on the ground of surprise.

No matter how absolute the surprise of a party, nor how exempt he may be from fault, the granting of a new trial because of surprise depends upon the circumstances of the case, and the interests of substantial justice.

Where, when a case was called for trial the plaintiff, although a material witness, was absent, answered ready and proceeded to trial expecting that his witness would be present before the plaintiff's case was closed, and the complaint was dismissed because of lack of proof of a material fact which the absent witness was to have established — *Held*, that a new trial should not be granted because of surprise; that the plaintiff took the chances of the witness's arrival and must abide the result of her improvident experiment.

Cahill v. Hilton (81 *Hun*, 114), distinguished; *Oakley v. Sear* (7 *Robt.*, 111), followed.

(Decided February, 1893.)

Motion by the plaintiff for a new trial on the ground that she was surprised by the absence of the witness.

The facts are stated in the opinion.

PRYOR, J.—The method of this application is anomalous. Instead of moving on a case, the plaintiff presents an affidavit only, and that fails to communicate any information respecting the merits of the action as disclosed

Leonard v. The Germania Fire Insurance Co.

on the trial.* No matter how absolute the surprise of a party, nor how exempt he may be from fault, still the granting a new trial depends upon the circumstances of the case and the interests of substantial justice (*Tyler v. Hornbeck*, 48 *Barb.*, 197, 199; *Williams v. Montgomery*, 60 *N. Y.*, 648). How, upon the meagre matter before me, can I say that justice will be promoted by according the plaintiff another trial?

But, indeed, she exhibits no such surprise as the law recognizes to be a sufficient ground for relief. She had notified the witness and he had been in court; but he failed to appear the day of the trial. Nevertheless, the plaintiff requested no postponement on account of his absence, but proceeded with the trial, "expecting he would be present before the plaintiff's case would be all presented to the court and jury." For lack of proof of a material fact, which the absent witness was to establish, defendant moved to dismiss the complaint; thereupon plaintiff suggested the withdrawal of a juror, but the court refused and dismissed the action. Thus, the plaintiff took the chance of the witness's arrival, and she must abide the result of her improvident experiment. So are all the cases (*Gawthrop v. Leary*, 9 *Daly*, 353, 354; *Messenger v. Bank*, 6 *Daly*, 190, 200). In *Cahill v. Hilton* (31 *Hun*, 114), a motion for an adjournment was seasonably made.

In *Oakley v. Sears* (7 *Robt.*, 111, 113), the court said that a plaintiff is not remediless, because, in case of surprise, he can submit to a non-suit. Here, as the complaint was dismissed, the plaintiff may sue again.

Except in total disregard of the established rule and of all precedents, I cannot grant this motion.

Motion denied, but without costs.

* See as to necessity of making case for the purpose of such a motion, *Code Civ. Pro.*, § 998.

Dinan v. Coneys, *et al.*

DINAN, APPELLANT, v. CONEYS AND ANOTHER,
RESPONDENTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
FEBRUARY, 1893.

§§ 500, 501.

Counterclaim—when may be interposed in action for ejectment—judgment.

In an action by a devisee of real property to recover possession thereof, the defendant may counterclaim a legacy given her by the same will, and made thereby a charge upon the land, and the counterclaim being established, the judgment should appoint a referee to sell the land, and out of the proceeds to pay the legacy, and pay over the remainder to the plaintiff. (DYKMAN, J., dissenting—*Held*, that the devise could not be set up as a counterclaim, because it did not tend to reduce plaintiff's recovery, and also because, the plaintiff never having promised to pay it, it was not a claim against him, but merely a charge on the land.)

(Decided February 13, 1893.)

Appeal by plaintiff from so much of a judgment in an action adjudging him entitled to the possession of certain real property, as awarded a money judgment for a devise charged thereon against him, and to the defendant, Hannah Coneys.

The opinion states the facts.

Snider & Hopper, for plaintiff, appellant.

A. & A. X. Fallon, for defendants, respondents.

BARNARD, P. J.—Daniel R. Dinan devised a parcel of real estate, situate in Rockland county, to his son, the

Dinan v. Coneys, et al.

plaintiff. He gave the sum of \$300 to the defendant, Hannah Coneys, and made the same a charge on the land. The defendants have occupied the land since the testator's death in 1883. The plaintiff seeks to recover possession of the land. The defendant, Wm. Coneys, avers that he has a claim for repairs made at plaintiff's request. The defendant, Hannah Coneys, sets up the bequest and its charge upon the land, and asks judgment for its recovery of the plaintiff. The claim for repairs was rejected on the trial. No proof was given to show the payment of the \$300, or of any part of it. The referee gave judgment for the recovery of the land by the plaintiff, and for a judgment for the bequest, with interest, in favor of Hannah Coneys against the plaintiff.

By section 501 of the Code, a defendant may set up a cause of action connected with the subject of the action. The subject of the action is the real estate in question. One party seeks possession, and the other seeks to recover the amount of a lien she has on the property, created by the instrument which gave the title to the plaintiff. (*The G. & H. Mfg. Co. v. Hall*, 61 N. Y., 226.)

The judgment did not go far enough. There should have been appointed a referee to sell the land, and out of the proceeds to pay the legacy, and after the payment of the same, to pay over the balance to the plaintiff.

The judgment should be modified in this respect, and, as modified, affirmed, with costs.

PRATT, J., concurred.

DYKMAN, J. (dissenting).—This case presents some unusual features. The action is for the recovery of real property in Rockland county, formerly owned by Daniel Dinan, the father of the plaintiff and the defendant, Hannah Coneys, who is the wife of the defendant, William Coneys.

Daniel Dinan died in the year 1883, seized and possessed of the property, leaving a last will and testament

Dinan v. Coneys, et al.

by which he devised the same to the plaintiff, and gave to the defendant, Hannah Coneys, a legacy of \$300, which he charged upon the land.

The defendants went into possession of the premises after the death of the testator, and were in possession at the time of the commencement of this action. The defendants answered separately.

William Coneys said in his answer that he had expended large sums of money in the reparation of the buildings upon the premises, with the knowledge, permission and consent of the plaintiff, amounting to \$1,175, for which he demanded judgment against the plaintiff.

The defendant, Hannah Coneys, set up her legacy, and demanded judgment therefor with interest.

The plaintiff served a reply to the answer of Hannah Coneys, in which he admitted the claim, but said that she remained upon and occupied the premises under an understanding that the value of the use and occupation and the rents collected should be applied to the payment and satisfaction of the legacy, and charged that the value of the use and the rents received exceeded the amount of the legacy, and that the same was thereby paid and discharged.

The cause was referred to a referee to hear and determine, and upon the trial the plaintiff proved that he was the son to whom the property was devised, the death of his father, the possession of the defendants, and then offered the will in evidence, and rested. He made no effort to prove the agreement set up in his reply for the satisfaction of the legacy of his sister.

The defendant, William Coneys, then undertook to prove the repairs he had made to the buildings on the premises, but the testimony was all excluded upon the plaintiff's objection.

The interest upon the legacy of Hannah Coneys was computed, and the testimony was closed.

The referee reported in favor of the plaintiff for the

Dinan v. Coneys, et al.

recovery of the premises, and in favor of the defendant, Hannah Coneys, for \$447.45.

Judgment has been entered accordingly in favor of the plaintiff against the defendants for the recovery of the premises, and in favor of the defendant, Hannah Coneys, against the plaintiff for \$447.45.

From that judgment the plaintiff alone has appealed, but he only seeks to reverse the money judgment against him.

The defendant, William Coneys, has not appealed, and, therefore, we cannot examine the rejection of his claim by the referee.

The sole question, therefore, for our determination upon this appeal is whether the referee committed an error in allowing the defendant, Hannah Coneys, to recover her legacy against the plaintiff in this action.

In the first place it was not set up, and could not be allowed as a counterclaim. The plaintiff was entitled to the possession of the premises, and this was an action at law for their recovery. No counterclaim could reduce his recovery, and the claim interposed against him was not designed to work such reduction. It was an independent demand, and at most constituted a legal cause of action. In the next place, no action at law could be maintained against the plaintiff for the amount of the legacy without an express promise to pay, and no such promise was set up or proven.

No personal obligation ever rested upon the plaintiff for the payment of the legacy. He could refuse to accept the devise, and leave the legatee to her remedy against the land. The fact that her father gave her a legacy imposed no personal duty upon the plaintiff. He can only be sued at law as terre tenant, or upon a promise express or implied.

The portion of the judgment, therefore, in favor of the defendant, Hannah Coneys, against the plaintiff must be reversed, with costs.

Judgment modified as stated in opinion, and as modified affirmed, with costs.

Countryman v. Countryman.

COUNTRYMAN v. COUNTRYMAN *et al.*,

SUPREME COURT, THIRD DEPARTMENT, JEFFERSON COUNTY,
SPECIAL TERM, July 1893.

§§ 1,393, 1,404.

Exemption from execution—pension money.

Where moneys received from the federal government by a soldier in the late civil war, as pensions for disabilities, were handed by him to his wife, and by her deposited to her own credit in a saving's bank and subsequently used, a part in the purchase in his wife's name of a lot and the balance in part payment of the cost of erecting a house thereon, and a mortgage on the house and lot for \$600 was executed by the wife, and several mechanics liens against the property were filed in which the wife was named as owner, but it appeared that although she held the legal title, the parties had all along regarded the money and property as belonging to plaintiff, —*Held* that there was no gift or transfer to the wife of the title to the pension moneys or the property purchased with it [₁₋₃]; that, having acquiesced in what was done, and directed the construction of the house, the husband was bound by the acts of the wife the same as though they were his own personal acts [₃]; that the lot before the house was built, and the house when erected to the extent of the pension money put into it, were exempt from seizure in legal proceedings; [₄] that such exemption was limited to the amount of the pension money put into the property, and the surplus above such pension was not exempt, but was subject to claims against the owner, and a mortgage or other lien would attach to and hold it; [₅]; that the exemption could only be cancelled in the manner provided in section 1404 of the Code of Civil Procedure and was not so cancelled by the agreement to build and the mortgage. [₇]

Yale County National Bank v. Carpenter, (119 N. Y. 550) [₁] Peck v. Ormsby (28 St. Rep. 518) [₅] followed.

In such a case, the mortgage and mechanic's liens are valid, subject to the exemption; [₈₋₉] and they should not be set aside, because

Countryman v. Countryman.

the mortgage was given by and the liens filed against the wife, as she had the legal title [1];

A mortgage given to a builder to pay for erecting a house not then completed, is no better in the hands of an assignee from him, than it would be in his hands; is subject to any equities in favor of the mortgagor, against the mortgagee and can be enforced only to the amount owing the mortgagee under the contract for erecting the building [10].

Instance of a case in which a contract to build a house was held to have been substantially performed under the rule of law, that in such case damages should be deducted from the contract price on account of the work left unperformed or improperly done. [11-12]
(Decided July 19, 1898.)

Action to determine title to certain real estate, and settle question of exemption thereof and lien thereon, and for other equitable relief.

Plaintiff was a soldier in the Rebellion, and in the fall of 1890, received from the U. S. Government as pension for disabilities, the sum of \$762—of this amount \$700 was handed over to his wife, and she deposited it to her own credit in the Jefferson County Savings Bank, Watertown, N. Y. February 26, 1891, a vacant lot corner of Mill and Elm Streets (North River) City Watertown, was deeded to the wife by Mrs. Chambers, and the purchase price thereof, \$250, was paid from the \$700 which had been deposited in the Savings Bank. In March, 1891, the plaintiff and his wife had negotiations with McNulty, a carpenter and contractor, with reference to building a dwelling house upon the lot so purchased, resulting in a contract by parol to build the house. There is considerable disagreement as to the terms and details of the contracts. It is agreed, however, that the total contract price was to be \$1,100 of which \$600 was to be in a mortgage upon the property itself, and the balance of \$500 in cash, and of this latter amount \$450 was to be advanced from time to time as the work progressed, and \$50 to be paid when the house was completed. Under the contract McNulty went on and built the house. The \$450

Countryman v. Countryman.

in cash was paid as follows: March 23, 1891, \$100; April 6, 1891, \$100; and April 8, 1891, \$250, and all this was taken from the Savings Bank, and this, together with the \$250 paid for the lot used up the \$700 of pension money deposited in the name of the wife in the fall of 1890. The bond and mortgage were given April 22, 1891. They were made by the wife alone, the husband not joining with her. They provided for the payment of at least \$100 of principal each year, and semi-annual interest. They were assigned by McNulty to Goodale, April 24, 1891, and the mortgage and assignment were recorded at once after they were given. Goodale advanced upon the bond and mortgage, April 24, 1891, the day of the assignment \$175 and then June 4, 1891, \$25; June 5, 1891, \$25; June 6, 1891, \$50; June 15, 1891, \$40.70; June 19, 1891, \$11.10; June 30, 1891, \$25; July 9, 1891, \$50; July 20, 1891, \$25; July 25, 1891, \$10; making in all \$436.80. McNulty filled a lien against the property July 28, 1891, \$333; Sylvester A. Soper one July 30, 1891, \$51.17; Charles E. Deline one August 3, 1891, \$40; Charles W. Easton one October 2, 1891, \$17.20.

An action to foreclose the McNulty lien was commenced August 4, 1891, and is still pending, undetermined the other lien holders being parties to that action. The liens were all against the plaintiff's wife, or the owner of the property. She still has the legal title to it.

So far the facts do not seem to be disputed. There are other matters of fact controverted, and these will be determined.

Bradley Winslow, Hannibal Smith and James A. Ward, for plaintiff.

Henry Purcell, for defendant, *Goodale.*

John Conboy, for defendant, *McNulty.*

T. F. Kearns, for defendant, *Soper.*

S. S. Trowbridge, for defendant, *Deline.*

Countryman v. Countryman.

WILLIAMS, J.—I think I must hold that there was, as [1] between the husband and wife, no gift or transfer of the title to the \$700 pension moneys or the property purchased with it, the lot and labor and materials put into the house. The business was very strangely done. From the first the transaction had the appearance of a gift or transfer, the deposit of the money, the taking of the deed, the giving of the mortgage and bond, all in the name of the wife, with the knowledge and without objection of the husband, would lead naturally to the conclusion of a gift and transfer. If these parties had been interested in having the title in the wife, and they had supplemented their outward indication of a gift and transfer with their real evidence of intention, there would have been no answer to the claim of a gift and transfer. Their evidence here is, however, that no gift or transfer was intended, but the money and property were all along regarded by them as plaintiff's property—as between themselves on the face of their evidence, and considering the nature of the fund, and the strong equity in preserving that fund for the soldier himself, so as to be covered by the exemption provided by law; I don't like to hold a gift and transfer to the wife took place. She may have desired herself to get the property into her own hands so as to preserve it as a home, but I do not like to find that he assented to a gift or transfer.

[2] So far as innocent parties dealt with her, supposing and believing she was the owner, they should be protected, but as between the husband and wife, themselves, I must hold he has all along been the owner of the moneys and the property in which it was invested.

So far as the wife has acted it will not do to say she has acted without authority from the husband. He could not sit by, permit her to buy and take title to the lot, and give bond and mortgage in her own name, and direct [3] about the construction of the house, and make no objections at the time, and then when work and labor had

Countryman v. Countryman.

been furnished and money advanced upon the bond and mortgage, allege want of authority in the wife. The husband must be held bound by these acts of the wife, the same as though they were his own personal acts. In [4] this view, the lot, before the house was built, was exempt under the Statute, and the house when erected, was to the extent of the \$450 put into it, also exempt. So that the plaintiff had a right to an exemption under the statute of the house and lot to the extent of \$700; the amount of pension money put into it. (Code Civ. Pro. § 1393). *Yale Co. Nat. Bank v Carpenter*, 119 *N. Y.* 550. *

In the case cited, the purchase price of the property was [5] a part paid with pension money and the balance secured by a mortgage upon the same property; an attempt was made to sell on execution. The court decided the case upon the assumption that the property was worth no more than the amount of pension money paid and the mortgage given back, that there was or could be no surplus, and therefore the property was exempt from sale under the execution. It could not well be held that where the whole purchase price paid or secured was not pension moneys, that the exemption would cover the whole property. The exemption would, at most, be limited to [6] the amount of pension moneys put into the property, and it seems to me by analogy to the rule in cases of Homestead exemption, the balance over and above the amount of pension moneys, would not be exempt, but would be subject to claim against the owner, and a mortgage or other lien would attach to, and hold, such surplus. (*Section 1404 Code Civ. Pro. Peck v. Ormsby*, 28 *N. Y.*

* Reversing S. C. 14 *N. Y. Civ. Pro.* 372. The case above referred to in effect reverses *in re Kendrick*. The exemption does not continue after the death of the pensioner, in favor of those not constituting a family, for whom the pensioner provided and to whom the money descends. *Matter of Winans* 5 *Dem.* 138.

Countryman v. Countryman.

S. R. 518). I do not overlook the fact that there are provisions of the Code of Civ. Pro. providing for a lien upon the surplus above \$1,000 in case of Homestead exemptions. But it will be remembered the Homestead is made exempt by express provision of statute, while a home purchased with pension money is not. In the latter case the pension is exempt, and the courts have held a home purchased with pension money, is also exempt, and thus under the statute and decisions, a home so far as purchased with pension moneys is exempt like a homestead. The extent of the exemption in this case however, is not a definite amount as in the Homestead exemption, \$1,000; but such amount as is represented by the pension money. Beyond that amount, the money invested, must be free from such exemption. To illustrate, in the Bank-Carpenter case (above cited). Suppose, at the time the execution sale was to take place, the mortgage, given as a part of the purchase price of the property, had been wholly or partly paid up from other than pension moneys; would the whole property still have remained exempt from sale on the execution? Clearly not and in such case I see no way in which the exemption could be protected, except by regarding the amount of the pension moneys as a lien upon the property, and permitting a sale on execution subject to such lien.

The only other solution of the difficulty would be to regard the pension moneys as so mixed up with other moneys as to have lost their exempt character, the identity of the fund having been lost. I should not be willing to take this view, because the rule is that exemption statutes should be liberally construed in favor of the party claiming exemption. They rest upon a public policy, looking to the protection of the soldier and his family against improvidence and misfortune. The making of the agreement [1] to erect the house and the giving of the mortgage did not operate to cancel the exemption under the statute.

Countryman v. Countryman.

Section 1404 Cod. of Civ. Pro. above cited, provides the only method by which such cancellation may be effected, and that any other release or waiver shall be void, and that a mortgage shall be ineffectual until the exemption shall be cancelled, except to the extent of purchase money secured thereby. In *Peck v. Ormsby* (above cited) [*] it was held the language "ineffectual &c." meant ineffectual "as to the exemption," and a mortgage would be valid, though not for purchase money, subject to the exemption.

In view of these considerations, I must hold the [*] mortgage and liens upon this property, so far as the exemption is concerned, are valid liens upon the property, subject to the lien for the \$700 purchase money. The plaintiff and his wife have put nothing into this property except this \$700 of pension money. They are very likely liable upon the bond at law, but no money has been paid over by them except the \$700. Whatever else has been expended on and about the place has been expended by McNulty, and advanced in money, labor and materials by the assignor of the mortgage, and the holders of liens. This action is equitable in its nature, the plaintiff asking that equity be done him. It is a rule in equity that he who asks equity must do equity. It would not be equitable to permit the plaintiff to have a property valuable over and above the moneys he has put in to this place and refuse to pay for the money, labor and materials [*] others have put into it. There is no reason why the mortgage or liens should be set aside because the mortgage was given by, and the lien filled against the wife, as the owner of the property, at law she was and still is the owner taking and still holding the legal title. The mortgage and liens are good, notwithstanding the equitable title is now held to be in the plaintiff. They cannot be set aside for this reason, all their rights however are under McNulty and his contract to build the house.

Countryman v. Countryman.

The mortgage in Goodale's hands is no better than if [10] it were in the hands of McNulty. It is subject to any equities in favor of plaintiff against McNulty, and the liens can in any event be enforced only as to any amount still owing to McNulty under the contract. We are, therefore, brought back to a consideration of the contract relation between McNulty and the plaintiff, personally, or as represented by his wife.

Great difficulty arises here, in determining what the [11] particular terms of the contract were. These contracts ought always to be in writing, and then enough difference and disagreements arise. It is unfortunate that all the details of the work should rest in conversations and negotiations, where mistakes so frequently occur in parties understanding each other, and where, in case of litigation, there is so much opportunity for parties to testify untruly. Here the parties saw fit to trust their whole contract, all its details to parol, and neither must complain of the court if he does not secure such a result as he regards himself entitled to. The great disagreement is as to the size of the house, and the consequent room inside. The plaintiff and his wife claim it was to be 22 feet front, and thus affording room for a hall, hall stairs and front door, and which were to be put in, while McNulty claims it was to be only 17 feet front, and no front hall, stairs or door. It is difficult to conceive how the parties could honestly disagree in such important particulars. McNulty built the house as he claims it was agreed to be built in this respect. I only refer to this disagreement to illustrate the nature of the differences between the parties. I do not intend to go into all the details of the differences. I would not be willing to find that McNulty agreed to build so large and so complete a house as the plaintiff and his wife claim for \$1,100, because such a house would cost very much more than the price agreed upon, very likely twice as much. Such

Countryman v. Countryman.

a contract would not be reasonable or probable. On the other hand, McNulty did not treat the plaintiff fairly. The work, even on his own claim as to a kind of house he was to build, was not well or properly done, and the material was not of good or proper quality. I recognize the fact that good work and material for such a priced house as this one was to be is not the same kind of good work and material that would be expected for a \$5,000 or \$10,000 house, but the material should be at least fair and not worthless, and the work should be well done and not a shabby job. Then again McNulty, fairly within the agreement, was to have the money paid him, and the mortgage furnished to get money or to purchase the materials and employ the labor upon this house as necessary as the job progressed, and yet before he had done much of anything to the house he had managed to get all the money except \$50 and the mortgage, and an advance upon that of \$175, showing an unfair way of dealing with the plaintiff and the job. Now without going into [12] details I am inclined to hold that the contract to build the house has been substantially performed under the rule of law, that in such case damages should be deducted from the contract price on account of the work left unperformed or improperly done, and the contractor not held to have failed to perform his contract so far as to permit a recovery at all. This seems to me in accordance with equity. The plaintiff has the house, such as it is, and is enjoying it. He ought not to have it without paying what is fair and right, and if he prefers to give it up and take his money he has paid in he is able to do it. I am inclined to find that McNulty has been paid all he is entitled to under the contract, having received in cash from plaintiff \$450 and from Goodale under the mortgage \$436.80, besides the amount allowed Goodale on the purchase of the mortgage—say in all \$460. These are the figures stated by counsel in their

Countryman v. Countryman.

briefs; that he is entitled to nothing under his lien, nor are the other lien holders; that Goodale is entitled to hold and enforce his bond and mortgage for the \$460, subject however to plaintiff's claim for pension money, \$700 interest to be allowed on both these amounts from the times the moneys were advanced.

The decree will then provide that the property belongs to plaintiff, and the title thereto be conveyed to him by his wife; that the property in plaintiff's hands is exempt from seizure in any legal proceedings to the extent of the \$700 pension money paid thereon by plaintiff; that Goodale has a valid mortgage thereon for the \$460, subject to the claim of \$700, and that the other defendants have no interest in the property under their alleged liens. No costs will be allowed against any of the parties personally. The stenographer's minutes should be paid for by plaintiff, as he has title to the property subject to Goodale's mortgage. I should say that Goodale should have a sale of the property under his mortgage in this action to save him further expense, unless plaintiff shall pay up what is already due upon the mortgage and the charges for stenographer's minutes. In case of a sale it may be of the whole title, and from the proceeds plaintiff should be first paid, then Goodale his mortgage, then stenographer's minutes, then Goodale's costs as of foreclosure, and surplus if any should be paid to county treasurer. These are merely suggestions as to final decree, about which, however, I will hear counsel before signing decision.

Counsel will prepare formal decision and agree upon its form and, present for signature.

 McEntyre v. Tucker.

MCENTYRE, RESPONDENT v. TUCKER, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
OCTOBER, 1893.

§§ 992, 993.

Appeal—when facts reviewed—case on appeal.

When a case upon appeal states that it "contains all the evidence bearing upon the exceptions given—(taken) upon the trial," and the questions of fact before the Court for review arise because of the refusal of the referee before whom the case was tried to find as requested and the exceptions taken to such refusal; such certificate is sufficient to warrant the Court in reviewing the facts on appeal.

Testimony strictly speaking means the evidence of a witness given under oath, even when used in its widest sense it still has reference to some living agent as its author, while the evidence includes not only the testimony of witness, but everything else which is legally submitted to a Court, as a means of ascertaining the truth of any alleged matter of fact under investigation as deeds, letters, contracts, etc.

Davis Sewing Machine Co. v. Best (50 Hun, 79) Clark v. Simpson (14 N. Y. Supp., 61) followed. Dibble v. Dimmick (53 St. Rep., 22); Hyman v. Friedman (5 Id., 436 Aff'd 138 N. Y., 639) distinguished.

The only mode of reviewing a finding of fact of a Court or referee as being against the weight of evidence is by means of a request to find and exceptions to the refusal to find as requested.

Notwithstanding a case on appeal does not contain a statement and all the evidence upon the question sought to be reviewed is contained in the case which is still open to the court to determine if there was no evidence to support any finding, of fact duly excepted to.

Davis Sewing Machine Co. v. Best (50 Hun., 79.)

Halpin v. Phoenix Insurance Company (118 N. Y., 172) followed.

Where a person is made the sole and only arbiter of a contract his decision is necessary before an action at law can be maintained.

McEntyre v. Tucker.

Where a contract for the erection of a building provided that the work should be done to the satisfaction and under the direction of an architect; that his certificate should be essential to a payment, and makes him the sole arbiter as to the regularity, propriety and value of the work, the contractor cannot recover for the work where he has no such certificate, but has merely a certificate signed in the architect's name and signed by his assistant, which certificate was given without the authority from or knowledge of the architect, and the fact that the certificates in like form had been given during the progress of the work done upon which partial payments had been made, is not waiver of the owner's right to require subsequent certificates by the architect.

Omissions and variations of the ornamentation agreed to be made upon a house may satisfy a valid objection to paying for the work done. (*Decided Oct. 18, 1893.*)

Appeal by the defendant from a judgment entered upon the report of the referee.

The facts are fully stated in the opinion.

Dill, Chandler & Seymour, for defendant, appellant.

Henry G. Atwater, for plaintiff, respondent.

BOOKSTAVEN, P. J.—This action is brought to recover a balance claimed to be due on a building contract and for extra work. The first question to be determined is whether or not the certificate annexed to the case is sufficient to warrant the Court in reviewing the facts on appeal. It is in the following words: "The annexed case contains all the evidence bearing upon the exceptions given (taken) upon the trial." This is very different from the certificates in *Dibble v. Dimick* (53 *State Rep.* 225) and *Hyman v. Friedman* (45 *Id.* 636, *aff'd* 138 *N. Y.*, 639), in both of which the work testimony was used in place of evidence, which is a word of very different import. *Testimony*, strictly speaking, means the evidence of a witness given under oath, and even when used in its widest sense it still has reference to some living agent as its author; while *evidence* includes not only the testimony of witnesses, but everything else which is legally submitted to a Court as a means of ascertaining the truth of any alleged matter of fact under investi-

gation, as deeds, letters, contracts, &c. (consult Webster, Imp. Dic., Burrill's L. D., *ad his verbis*). Hence the necessity of the use of the broader word prescribed, as was well illustrated in the case first cited where a number of exhibits were left out of the case, and yet it contained a certificate as to all the testimony being in. The usual form is that the case contains "all of the *evidence* material to the question sought to be reviewed" (Baylis on New Trials and Appeals, 573). In *Davis Sewing Machine Co. v. Best* (50 *Hun*, at p. 79) it was said: "Where a question of fact is sought to be reviewed it should be stated in the case that it contains all the *evidence*, or all bearing upon the question of fact sought to be reviewed." The certificate under consideration substantially complies with this rule. The questions of fact before the Court for review arise because of the refusals of the referee to find as requested by the defendant, and the exceptions taken to such refusals, and the certificate conforms to what was said by Macomber, J., in *Clark v. Swift* (14 *N. Y. Supp.*, 61): "Under section 993 of the Code of Civil Procedure, it is the duty of the party where there is conflicting evidence to request a finding in accordance with the contention of the party, and in case of its refusal to find such request, it would be the duty of the appellate Court to look carefully into the evidence and to determine whether or not the conclusion reached by the referee was correct."

"Section 992 of the Code of Civil Procedure in terms precludes exceptions to findings of fact as such, but section 993 declares a finding of fact which is without any evidence tending to sustain it, or a refusal to make any finding reasonably requested, to be a ruling upon a question of law, and subject to exception as such under section 992. From which it results that the only mode of reviewing a finding of fact of a Court or referee, as being against the weight of evidence, is by means of a request

McEntyre v. Tucker.

to find and an exception to the refusal to find as requested " (Hogg v. Shank, 17 *N. Y. Civ. Pro.*, 128).

But if there were no statement that all the evidence upon the question sought to be reviewed was contained in the case, it would still be open to the Court to determine that there was no evidence to support any finding of fact duly excepted to (Davis Sewing Machine Co. v. Best, *supra*; Halpin v. Phenix Insurance Co., 118 *N. Y.*, 172), where it was said: "A statement that all the evidence given on the trial is contained in the case is not essential to present for review in this Court a finding alleged to be without evidence to sustain it. The appellant is, therefore, correct in his claim that the finding excepted to is properly before the Court for review, and we must assume that all the evidence introduced on the trial and bearing upon the fact of the occupancy has been inserted in the case."

We, therefore, think we are bound to review the facts as presented by the case and to determine whether or not the referee's findings are in accordance with them.

The complaint sets up the contract between the parties and the order of payment, and that every payment was conditional upon a certificate of the architect that the work had been done to his satisfaction, alleges that certain extra work had been done and that the architect had certified that all of the work had been done to his satisfaction, and then sets out the balance due, less certain payments made by the defendant to certain material men. The amended answer denies the value of the work, and also that the certificates had been obtained from the architect, or that he had certified that the work had been done to his satisfaction as required by the contract, and on the other hand alleged that the work was defective in specified details and inferior in quality, and then attacks the validity of the certificates made by one Smith, an assistant of the architect, and not by the architect himself or by his authority. A

McEntyre v. Tucker.

second defense is also set up, which it is not here necessary to notice. The contract is very strong along the line that all of the work should be done to the satisfaction and under the direction of the architect, and that his certificates should be essential to a payment, and it makes him the sole arbiter as to the regularity, propriety and value of the work, and consequently brings the case within *Glaucius v. Black* (50 *N. Y.*, 145).^{*} Where a person is made the sole and only arbiter of a contract, his decision is necessary before an action at law may be maintained. And the chief question in this case is as to whether or not the certificates signed "George A. Freeman, Jr., by W. Holman Smith," are such certificates as the contract called for, and whether or not supervision by the architect and the production of certificates signed by him or by his authority had been waived, and that of his assistant and certificates given by him were accepted in lieu. As before stated, the contracts were strongly drawn, so as to secure the supervision and certificates of the architect, yet respondent contends that all this was waived because the architect did but little, if any, supervision of the work to appellant's knowledge, and that payments were made on the assistant's certificates in the form above stated. But the payments that were made, were to be made by the terms of the contract, when certain stages on the buildings were reached, and these stand on a different footing from the subsequent payments, which were only to be made when the buildings were completed to the satisfaction of the architect. It might well be that the defendant was content to pay, and believed he should make these payments when called for by the contract, and yet in no sense waive his right to the final completion according to the terms of the contract. The latter certificates were not paid because, as defendant then claimed, the

^{*}Where a contract to erect a house does not involve a matter of taste the refusal to be satisfied must be reasonable and not captivus or fraudulent (*Cross v. Belknap*, 24 *Weekly Dig.* 256.)

McEntyre v. Tucker.

work was not properly done, and also because the certificates were not proper or valid ones; and he insisted by letters and telegrams that the architect and not his assistant should act in the premises. As to these later certificates, the defendant promptly declined to receive or act on them, insisting on his right to the advice and judgment of the architect himself, thus asserting the well-known principle *delegatus non potest delegare*. The plaintiff himself testified that about the 15th or 16th of September, 1882, he took the certificates after those calling for the first four payments, and handed them to the defendant, who looked them over and handed them back, refusing to take them. The defendant said he would take advice, and subsequently the plaintiff and defendant had a consultation with their counsel. As the claim in this action is based on these subsequent certificates, the evidence that the assistant acted as superintendent under the architect of the buildings is not sufficient, in our opinion, to warrant a finding of fact that the defendant acquiesced in or waived the final certificates of the architect himself. On the contrary, he promptly refused to pay the amounts called for by them. There is no evidence of any ratification, consent or acquiescence on the part of the defendant in the acts of the architect's assistant.

But, again, there is a failure of any satisfactory proof that the architect in any way authorized the giving of the final certificates by his assistant. He himself testified: "I did not know anything about the others (*i. e.* the later certificates) being given. I never, in any instance, authorized Mr. Smith to sign my name to those certificates. I can only state that I knew nothing about the final certificates being given. I knew before they were given that Smith had given out some of these certificates. I knew McEntyre had money as the work went on, but I never knew about the final certificates, and I never authorized Mr. Smith to sign any certificate for me;" and this he re-

peats emphatically. Hence, there was an entire failure of compliance with a condition precedent to requiring payment, and we find no evidence which would lead us to the conclusion that the condition had been waived by the defendant. Certainly, the payments made under the first four certificates, under the circumstances, do not warrant such a result. Even if defendant had full knowledge that these certificates were given without the architect's authority, this would not warrant such a conclusion. Mere payment, under such circumstances, even without the production of any certificate, would have been no waiver of defendant's right to require subsequent certificates, which he certainly did (*Barton v. Herman*, 11 *Abb. Pr. N. S.*, 378; *Harden v. Coleman*, 42 *Supr. R.*, 256).

We also think the objections to the work as done by plaintiff were well founded, and the demand for the certificates was not a mere pretext. The referee has found a considerable number of distinct variations, changes, and omissions from the designs, some of which, it is true, are not of much importance or of great value, but others are more material, as, for instance, the style of ornamentation, &c. Respondent contends that, although the ornamentation in the way of panelings, railings and cornices was not as elaborate as required by the specifications, yet that is not a matter of substance, and that ornamentation is merely added to and not a part of the house, quite forgetting that any true or tasteful ornamentation must, at least, appear to be a part of the construction and not a mere addition. It is quite true such a house might as well protect one from the elements as a more highly ornamented one, yet just in the ornamentation is a great part of the pleasure many cultivated people take in their dwellings, and one has a right to get what he bargains for and what the party of the second part agrees to deliver, or there would be no force in contracts. As all these questions are fairly raised in the case, we think the judg-

Batcheldor v. Nugent.

ment should be reversed and a new trial ordered : costs and disbursements of this appeal to the appellant to abide the event.

BISCHOFF and PRYOR, J. J., concurred.

BATCHELDOR, JUDGMENT CREDITOR *v.* NUGENT,
JUDGMENT DEBTOR.

NEW YORK COURT OF COMMON PLEAS, CHAMBERS, AUGUST,
1893.

§ 2458.

Supplementary proceedings—office for transaction of business in person defined.

An agent for an insurance company, having a chair and desk in the office of the company, in New York City, in the absence of proof that he was continuously away therefrom, by the requirements of his occupation, has a place for the regular transaction of business in person, in said city, within the meaning of the provisions of the Code of Civil Procedure, relating to proceedings, supplementary to execution.

An allegation in an affidavit for the examination of a judgment debtor in supplementary proceedings, that he has an "office" for the personal transaction of business, sufficiently states that he has a "place" for the transaction of business in person, and acts merely as a stronger allegation than the code demands, by stating the nature of the place.

The fact that the affidavit upon which an order for examination of a judgment debtor in supplementary proceedings was granted, incorrectly states date of the issuing of execution is not jurisdictional, and may be disregarded as an immaterial error.

(Decided August, 1893.)

Motion by judgment debtor, that an order for his examination in proceedings supplementary to execution, be vacated for irregularities.

Henry Daly, Jr., for judgment creditor and motion.

W. Manning Van Heusen, for judgment debtor, opposed.

Batchelder v. Nugent.

GIEGERICH, J.—The only jurisdictional question arising upon this motion relates to the debtor having a place for the regular transaction of business in person within the county at the time when the order was obtained. The other objections are to be formal defects as claimed. In the affidavit of the judgment debtor upon which the order to show cause was granted, he states that he has been for the past six weeks and still is an agent for an insurance company having an office in the City of New York ; and that he has desk and chair room in that office. This is certainly an office for the regular transaction of business within the meaning of the Code, and the principal contention is that the judgment debtor does not transact the business *in person*, because he is an agent. This view is not the aspect in which the business relation of principal and agent has been regarded by the Courts with reference to these proceedings. It is held where the judgment debtor transacts business through an agent, that the agent's place of business is not that of the principal. because of lack of personal identity (*Brown v. Gump*, 59 *How. Pr. R.*, 507). The provision relates not to the personal responsibility for keeping the place of business open, but to the personal attendance of the debtor in the place so kept. In absence of proof that the judgment debtor was continuously away from his admitted place of business by the requirements of his occupation, it is only reasonable to hold that he is within the intent of section 2458 of the Code of Civil Procedure.

The case of *Belknap v. Hasbrouck* (13 *Abb. R.*, 413), is not, therefore, applicable. The formal defects alleged are not material.

The statement in the affidavit that the judgment debtor has "an office" for the transaction of business in person merely acts as a stronger allegation than the Code demands by designating the nature of the "place." The affidavit has a very complete statement of the deponent's

Dode v. Manhattan Railway Company.

authority, and bears a satisfactory indorsement of the attorney's name (*Brown v. Howard*, 8 *N. Y. Sup.*, 59).

The question of defendant's residence within the county does not arise, as the proceedings are instituted upon the ground of defendant's legal place of business. The fact that the moving affidavit wrongly states the date of the issuing of the execution does not go to the jurisdiction. The only hardship which the judgment debtor predicates of the irregularity would go to the fact of his residence at the time of such issuance, but this fact is not connected with the question before us, as shown above. This is clearly a proper case for the Court to disregard an immaterial error in the exercise of its inherent powers (Code of Civil Procedure, section 723).

The motion, therefore, should be denied and the stay vacated, with \$10 costs.

DODE, RESPONDENT, v. MANHATTAN RAILWAY
COMPANY AND ANOTHER, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
JUNE, 1893.

§ 3253.

Extra allowance—upon what granted.

In an action to recover damages to rental value of real property caused by the maintenance of an elevated railway in front thereof, and to restrain its operation, where such damages are awarded, and it is adjudged that has been damaged in the sum of \$800 by the taking of his basements, an injunction is granted unless said sum is paid therefor, that sum represents the value of the subject matter, and an extra allowance based thereon, may be granted the plaintiff.

(Decided June, 1893.)

Dode v. Manha'tan Railway Company.

Appeal by defendant from an order of the New York Court, special term, granting plaintiff an additional allowance, and from an order denying a motion to resettle the first order.

The facts appear in the opinion.

Herbert Barry (Davies, Short & Townsend, Attorneys), for defendants, appellants.

Henry C. Foster for plaintiff, respondent.

PER CURIAM (VAN BRUNT, P. J., FOLLETT & PARKER, J. J.) This action was brought to recover the damages sustained by an abutting owner occasioned by the construction and operation of the defendants' railroad in one of the streets of this city. It was tried before a referee, who found that the damages sustained by the plaintiff by the operation of the road from the time it was built to the date of the trial of the action were \$338.76, and that the injury sustained by the plaintiff by the taking of the easements—usually termed fee damages—amounted to \$800. The plaintiff moved for an additional allowance, and five per cent. was granted. The defendants insist that the Court erred in granting an additional allowance upon the amount of the so-called fee damages.

The Code provides (§ 3253) that an allowance may be made "upon the sum recovered, or claimed, or the value of the subject matter involved." The \$800 does not represent a sum absolutely recovered by the plaintiff. It was payable at the election of the defendants. But the injury to the plaintiff's easements was a part of the subject matter involved in the action, and the damages occasioned by the injury to those easements having been assessed at the sum of \$800, we think that the amount represents the value of the subject matter involved, and that the Court

Dodge v. Manhattan Railway Company.

might grant an additional allowance upon that sum (*Lattimer v. Livermore*, 72 *N. Y.*, 174 ; *Johnson v. Shelter Island Ass'n*, 122 *id.*, 330).

Upon the motion made for an additional allowance the plaintiff failed to produce a certificate of the referee that the case was difficult and extraordinary. It is usual, and we regard it as the better practice, not to grant an additional allowance without a certificate of the referee who tried the cause; but the absence of it is not jurisdictional, and does not deprive the Court of the power to consider the motion and determine for itself whether the case falls within the language of the Code.

It is not recited in the order granting the additional allowance that the referee's report was read upon the motion, and the defendants insist that it was orally agreed on the hearing that the plaintiff had applied for a certificate from the referee, which had been refused. The defendants moved for a resettlement of the order, by having inserted therein the fact that it was agreed, upon the argument, that the referee had refused a certificate on the application of the plaintiff, and that his report was read on the motion, which was refused.

The report of the referee is a part of the record presented upon this appeal, and it must be presumed that it was used upon the motion, and so both parties get the same benefit from it as though it had been recited in the order that it was so used. The Court had the right to determine for itself whether or not it was agreed upon the hearing of the motion that a certificate of the referee had been applied for and refused. It may be that the attention of the Court was not called to the statement. Had the parties desired to make this fact a part of the record, either they should have filed a stipulation or else the party desiring to have it appear should have presented an affidavit on the hearing of the motion stating the fact.

We think no error was committed in refusing to re-

Petrakion v. Arbelly.

settle the order, and, under the view we have taken of the case, a resettlement of it would not have affected the rights of the defendants.

The orders should be affirmed, with \$10 costs and printing disbursements.

PETRAKION v. ARBELLY.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
AUGUST, 1893.

§ 508.

Pleading—complaint when sufficient in action for accounting with respect to partnership property—answer—not performance of condition precedent—counter-claim for money loaned.

Upon the trial of a demurrer to an answer and claim by the defendants that the complaint is insufficient, should receive first consideration. The existence of conditions precedent to the partnership agreement is not presumed in the absence of some of the restrictions in the contract and relation is presumed to arise at the time of the execution of the article.

A partner is entitled to an accounting whether there are assets to be divided or not, his liabilities afford him sufficient interest in the firm's affairs to enable him to stand before the Court with adequate cause demanding that relief and therefore the amount of the profits to which the plaintiff in an action for an accounting in such a case may be entitled, and the fact of his due performance of subsequent conditions need not be set forth in the complaint.

In an action brought by an alleged co-partner for an accounting with respect to the partnership property but where such averment is that the time for the performance of such condition has been extended for the space of six months, thereby confessedly altering it in effect from a precedent to a subsequent condition, the defense is insufficient and a demurrer thereto should be sustained.

An answer in equity which goes to the relief demanded is proper. *Van Rensselaer v. Brice*, 4 *Paige*, 177; followed.

Petrakion v. Arbelly.

The fact that the same allegations which form the basis of a partial defense, are embodied in the complaint, does not take from its character of matter within the meaning of the Code of Civil Procedure where it is extraneous to the basis of the relief asked and its recital does not preclude its use as a basis of defense.

An action between partners for an accounting is an action upon contract and the defendant may interpose as a defense another action arising upon the contract.

Where an answer alleged as a counter-claim "that before the signing of said agreement in writing on March 1, 1892, plaintiff was indebted to the defendant in the sum of \$435 for money theretofore loaned to plaintiff by defendant that no part of said sum has been paid" is not sufficient.

Upon the allegation of money loaned it is not sufficient to further aver that it is due as the presumption of law is that it was due at once.

Where the plaintiff is successful as to one of several grounds of demurrer to an answer and unsuccessful as to the other there should be no costs to either party.

(Decided August, 1893.)

Trial of issue or law arose by demurrer to answer.

The facts appear in the opinion.

John F. Reilly, for plaintiff, demurrer.

Parker & Seymour, for defendant, opposed.

GIEGERICH, J.—Under the rule that a demurrer searches the record, defendant contends that the amended complaint herein may be successfully attacked for insufficiency, in that it does not allege performance of a condition precedent to plaintiff's becoming defendant's partner under the agreement set forth. This contention properly requires first consideration. The condition in question was the payment of \$250, as a one-fourth contribution to the partnership capital, and, the complaint states, "when that was done, three-fourths of the printing establishment and newspaper should belong to the defendant, and

one-fourth to the plaintiff." The existence of conditions precedent to a partnership agreement is not presumed (Bates Part., § 84), and, in the absence of some restriction in the contract, the relation is presumed to arise at the time of the execution of the articles (*id.*, Parsons on Part., p. 14. The fact that the agreement was signed being set forth in the complaint, the presumption is raised that the parties became partners at that time. The clause providing for the payment of capital is set forth as relating to the partners' shares in the partnership property; but there is no fair inference that it was intended to impose a condition precedent to that relation. A partner is entitled to an accounting whether there are assets to be divided or not (Bates Part., § 921), as the adjustment of his liabilities affords him sufficient interest in the firm's affairs to enable him to stand before the Court with an adequate cause for demanding that relief. Therefore, the amount of profits to which this plaintiff may be entitled and the fact of his due performance of subsequent conditions need not be set forth in a complaint of this character. For these reasons, I consider that the demurrer herein, cannot reach the complaint as the first bad pleading.

The first ground of demurrer to the answer goes to the "second and separate defense," which is thereby attacked as setting up the general issue and combining therewith a plea in confession and avoidance.

The preceding allegations of the answer, which are referred to in setting up this defense admit the making of the partnership agreement and the terms thereof, as set forth, relating to the payment of the capital. Upon this admission, defendant alleges in avoidance, that the payment by plaintiff of the amount agreed upon toward the capital fund was a condition precedent, which had not been complied with, thereby directly attacking plaintiff's standing as a partner and going to his whole cause of action. While, as has been shown, this condition was

Petrakion v. Arbely.

not to be presumed as precedent to the contract when examining the statement of the cause of action for sufficiency, the fact that it was such a condition, and of its non-performance, may well be tendered by the answer as a vital issue. None of the denials which are combined with the separate defense, by reference to the preceding allegations, are inconsistent with the issues thus tendered, and so cannot affect its value upon a demurrer for insufficiency.

Unfortunately, however, for the sufficiency of this defense, the defendant, in seeking to strengthen it, has made it a nullity for the purposes of this action by further alleging that he had extended the plaintiff's time of performance of said condition for the space of six months, thereby confessedly altering it in effect from a precedent to a subsequent condition and leaving the plaintiff's standing as a partner unaffected.

Therefore, the demurrer to this defense must be sustained.

The "third and separate partial defense" is assailed upon the ground that it is not such a defense as is intended by section 508 of the Code. By the provisions of that section, such a defense must be a partial defense to the entire complaint or to one or more of the causes of action. The partial defense herein seeks to bar one of the collective forms of relief asked by plaintiff upon his statement of an entire cause of action. It is true that the relief asked is no criterion of the cause of action, and is merely what the plaintiff considers himself entitled to; but here the cause of action alleged would naturally entitle plaintiff to that form of relief which is sought to be barred by the defense of security having been given under an order of the Court in a former proceeding between the parties. This being an action where the recovery is in the nature of specific forms of relief, it would seem that the partial defense in this answer properly tends to reduce that recovery, and hence is a partial defense to the entire complaint within

the spirit of sections 507 and 508 of the Code. An answer in equity which goes to the relief demanded is proper. As was well said by Chancellor Walworth, in *Van Rensselaer v. Brice* (4 *Paige*, 177): "If the matter of an answer is relevant—that is, if it can have any influence whatever in the decision of the suit, either as to the subject matter of the controversy, the particular relief to be given, or as to costs—it is not impertinent."

The fact that the same allegation which forms the basis of the partial defense is embodied in the complaint does not take from its character of *new matter* within the meaning of the Code. It is extraneous to the basis of the relief asked, and therefore its recital does not preclude its use as a basis of defense (see *Manning v. Winter*, 7 *Hun*, 482).

The third ground of demurrer attacks the counterclaim as not being of the nature specified in section 501 of the Code of Civil Procedure. It is contended that the action is purely equitable, and that the defendant's alleged cause of action, arising upon the contract, cannot be interposed.

This view cannot be supported. The cause of action herein is founded upon contract, the demand for relief being no criterion of the nature of such cause (see *Marie v. Garrison*, 13 *Abb. N. C.*, 317).

The case of *Davidge v. Mayo* (5 *N. Y. Suppl.*, 475) appears to support the defendant's practice.

The further ground of demurrer to the counterclaim, for insufficiency, is without foundation. The allegation is that "before the signing of the said agreement, in writing, on March 1st, 1892, plaintiff was indebted to defendant in the sum of \$435, for moneys theretofore loaned to plaintiff by defendant; that no part of said sum has been paid." Thus it appears that the defendant's cause of action, sounding in contract, for the amount demanded existed prior to the commencement of the action, and has not as yet been met by payment. Upon an allegation of money loaned it

Thorn v. Beard.

is not necessary to further aver that it is due, as the presumption of law is that it was due at once (*Clute v. McCrea*, 12 *N. Y. St. R.*, 647).

The demurrer, as to the second separate defense, must be sustained, and in its other parts overruled. The plaintiff being successful as to one of his grounds of demurrer and unsuccessful as to the others, there should be no costs to either party (*Sargent v. The Sargent Granite Co.*, 52 *N. Y. State Rep.*, pp., 517, 519).

THORN AS ADMINISTRATRIX, &C., OF THORN, DECEASED,
RESPONDENT, v. BEARD, APPELLANT,
HAYT, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
JULY, 1893.

§ 3247.

Costs—liability of assignee of plaintiff's claim, for.

One to whom a claim has been assigned as collateral security for an indebtedness owing him, is not liable for and should not be ordered to pay the costs of an action brought by his assignor in his own name and in which he was defeated.

Peck v. Yorks (75 *N. Y.*, 421) followed.

(*Decided July 28, 1893*).

Appeal by defendant from an order of the Dutchess County special term denying his motion that Peter B. Hayt as assignee of the plaintiff's cause of action and the

Thorn v. Beard.

person beneficially interested in the action pay costs awarded defendant against defendant.

Other facts appear in the opinion.

Oliver T. Beard, defendant, appellant in person.

Hackett & Williams, for respondent, Hayt.

Wood & Morsehauser, for plaintiff, respondent Thorn.

PRATT, J.—Motion to make an assignee of a claim in suit pay costs. It was held in the case of *Peck v. Yorks* (75 N. Y., 421) that an assignment of a cause of action, made simply as collateral to an indebtedness of the assignor to the assignee, is not such a transfer as makes the assignee liable for costs, under the provisions of the old Code of Practice (§ 321), and this rule has been adhered to ever since.

It is true the Code was re-enacted and amended by substituting section 3247 of the new Code of Civil Procedure in place of section 321 of the old Code, yet in respect to this matter the latter section is not materially varied from the former. This is so stated in the notes to section 3247 of new Code. See *Banks' Bros. Annotated Code*.

The words "beneficially interested therein" mean one who takes the absolute title therein as transferee, and not a person who merely holds it as collateral security for the payment of a debt.

In this case it appears that Hayt, the person against whom the relief was sought, was a holder of the claim in suit as collateral security for a debt due him from the plaintiff, and in no other way was interested in said suit.

Order affirmed, with costs and disbursements.

Thorn v. Beard.

DYKMAN, J.—William I. Thorn was a lawyer in the city of Poughkeepsie, and died on the 1st day of March, 1890. Having performed professional services for the defendant, he assigned his claim therefor to Peter B. Hayt on the 3d day of January, 1888, as collateral security for an indebtedness to Hayt, and for certain contingent liability as indorser of notes.

In May, 1889, Thorn commenced this action against the defendant to recover such claim. He obtained a judgment against Beard, which was affirmed at the general term (14 *N. Y. Supp.*, 339 s.c. 39 *St. Rep.*, 30) but reversed in the court of appeals (32 *N. E. Rep.*, 141.) Mary Thorn was substituted as the plaintiff.

Upon the new trial, after the reversal by the court of appeals, the defendant obtained a judgment for costs, and thereafter made a motion at the special term to compel Mr. Hayt to pay the costs, upon the ground that he was the party in interest for whose benefit the action had been prosecuted. The motion was denied, and the defendant has appealed from the order of denial.

The appeal cannot prevail, for the reason that an assignment of a cause of action as collateral security to an indebtedness of the assignor to the assignee is not such a transfer as makes the assignee liable for costs. *Peck v. Yorks*, 75 *N. Y.*, 421.

The order should be affirmed, with \$10 costs and disbursements.

STEPHENS AS RECEIVER OF THE MCCALL PUBLISHING
COMPANY, RESPONDENT, v. PAGE AND ANOTHER,
APPELLANTS.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
AUGUST, 1893.

§§ 2358-2463.

Supplementary proceedings—cannot be maintained against a corporation.

Supplementary proceedings cannot be maintained against a corporation, nor can a receiver of a corporation be appointed in such proceedings and this is so, although the corporation is a foreign corporation or fiscal agency within the state.

(Decided August 9, 1893.)

Appeal by the defendants from a judgment rendered in the District Court of the City of New York, for the 3d Judicial District in favor of the plaintiff.

One Walter Logan, having recovered judgment against the McCall Publishing Company, a foreign corporation, issued execution against its property, which was returned unsatisfied, thereupon he procured an order for the examination of its president in proceedings supplementary to execution founded upon such judgment. A motion was made at Chambers in the City Court to vacate such an order, which was denied, and thereafter the examination of the President and defendant was had, and upon its conclusion the Court appointed, upon motion of the judgment creditor, the present plaintiff, receiver of the property of the corporation. He qualified by filling the bond required by the order appointing him, and after obtaining the leave of the Court, brought this action upon

Stephens v. Page.

a claim existing in favor of the corporation, and against the defendant.

One of the defendants interposed, and the action was that the plaintiff had no capacity to sue and the Court had no power nor jurisdiction to appoint the plaintiff receiver for the reason that supplementary proceedings were not authorized against a foreign corporation.

The plaintiff recovered judgment, and the defendant appealed therefrom.

A. A. Mitchell, for defendant, appellant.

E. J. Trinsdale, for plaintiff, respondent.

GIEGERICH, J.—The principal question presented by this appeal is, can a foreign corporation, not having a place of business within the state, be examined as a judgment debtor in supplementary proceedings, for the purpose of the appointment of a receiver of its assets to be applied upon an execution?

Section 2463 of the Code of Civil Procedure, excepts from the provisions of the foregoing sections relating to supplementary proceedings, domestic corporations and foreign corporations specified in section 1812, except in proceedings by or against the people.

Section 1812 refers to and is to be read with section 1810 and is declaratory of the kinds of corporations which come within the provisions of such latter section.

These corporations are domestic corporations and foreign corporations doing business within the state, or having therein a business agency, such being the corporations referred to in section 2463.

It is contended that since there is no mention in section 1812 of corporations not having a place of business within the state, therefore the provisions of the

Code relating to supplementary proceedings are applicable to the case at bar, but a careful reading of the enactment in question does not support this view.

Section 1810 is express in its terms, and declaratory of the cases where a receiver of the property of a corporation may be appointed. These cases do not include that of the appointment of a receiver in supplementary proceedings. Section 1812 prescribes over what corporations a receiver may be appointed, and is, in effect, strengthened by the declaration in section 2463, which we read as a reiteration of such former section.

Our conclusion is, that the appointment of the plaintiff as receiver of the McCall Publishing Company was unauthorized, and this conclusion appears to be eminently reasonable, in view of the familiar rule that preferences cannot be given to creditors of insolvent corporations. A contrary determination would, in effect, be a granting of such a preference. *Hammond v. Machine Co.*, 11 *How. Pr.* 29.

So much for the respondent's contention, but our determination of the question has the support of reason and authority upon still another ground. In order that supplementary proceedings may be instituted, the execution must have been issued to the sheriff of the county where the debtor has (1) a place for the regular transaction of business in person; (2) where he resides; or (3) if he is not then a resident of the state, to the sheriff of the county where the judgment roll is filed, (*Code Civil Pro.* § 2458), which latter requirement necessarily implies residence in the state at the time of rendition of judgment. None of these requirements can be met by a foreign corporation, as, in no sense, can such a corporation be a "resident."

Moreover, the whole intent to be gathered from the sections of the Code relating to these proceedings is that

Stephens v. Page.

the judgment debtor should be a natural person. *Hinds v. Railroad Co.*, 10 *How. Pr.* 487.

In *Sherwood v. Railroad Co.*, 12 *How. Pr.* 136, it is expressly held that supplementary proceedings are not to be taken against corporation. These two last cited cases are adjudications under the old Code, but the provisions of the present Code with reference to these proceedings are, as far as this question is concerned, as much a reenactment of the provisions of the old Code as though so enacted in express words. See, also, *Fiero Spec. Proc.* p. 519.

It follows that, since the proceeding was unauthorized in the first instance, the receiver appointed thereunder was without power to maintain the action now before us.

Our conclusion does not leave a creditor of a foreign corporation with property in the state, but with no place of business therein, remediless, as is contended by respondent to be the case. Equity can afford relief under a state of facts similar to those before us, as was done, but without preferences, in *Redmond v. Hoge*, 3 *Hun.* 171.

The judgment should therefore be reversed, and judgment absolute, for dismissal of the complaint, should be directed in favor of the defendants, with costs.

BISCHOFF J.. concurred.

HORTON, RESPONDENT, v. BARNES, *et al*, APPELLANTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
JULY, 1893.

§ 870 *et seq.*

Examination of party before trial—sufficiency of affidavit.

An order for the examination of a defendant before trial is properly granted upon the affidavit of her attorney and the pleadings in the action, where the allegation in the affidavit of the attorney on information and belief is contained in the complaint which is verified by the plaintiff.

(Decided July 28, 1893.)

Appeal by the defendants from an order of the Kings County Special Term denying the motion to set aside an order for the examination of the defendant Wainwright as a party before trial.

This action was brought to recover damages for personal injuries received by the plaintiff by lawfully using a certain apparatus alleged to have been kept by the defendants for the amusement of the public known as a "Razzle Dazzle." The plaintiff's complaint is verified by her. In which she alleges that she is informed and believes that at the time of the casualty which resulted in the injuries to recover damages for which she sues, the defendants were owners or lessees of a certain apparatus to be maintained for the use and amusement of the public, commonly known as a "Razzle Dazzle," and that they had possession and control and management thereof.

The defendants' answer is also verified, and denies the within allegation of the complaint. The plaintiff applied upon an affidavit made by her attorney and upon the plead-

Horton v. Barnes.

ings in the action for the examination of the defendant Wainwright as a party before trial. This affidavit after showing the nature of the action, the substance of the allegations of the complaint and the answer stated that the testimony of the defendant Wainwright is material and necessary to prove the control of such "Razzle Dazzle," at the time of said injuries; that deponent deemed it material and necessary to examine said defendant in advance of the trial of the action for the purpose of obtaining judgment, and showed and could dispense with the necessity of procuring witnesses to establish facts which may be admitted by defendants on such examination.

The complaint also averred on information and belief that all the facts above referred to are within the present knowledge of the defendants, and that it is material and necessary for the plaintiff to ascertain what control defendant had of the Razzle Dazzle mentioned in the complaint; that the testimony of the defendant Wainwright is thereby necessary and material for plaintiff for use upon the trial of this action, and plaintiff desires and intends to use such testimony on the trial of the action for the purpose of proving that the defendants Wainwright and Barnes had possession and control of the Razzle Dazzle at the time alleged in the complaint that they were the owners thereof.

Raphael J. Moses, Jr., for defendants, appellants.

Roswell H. Carpenter, for plaintiff, respondent.

PRATT, J.—This is an appeal from an order made at special term, denying defendants' motion to set aside an order for the examination of the defendant Wainwright before trial.

The motion was made on certain grounds particularly specified in defendants' notice of motion. It is unnecessary to refer to but two of them,—the third (that "the sources of the affiant's information are not disclosed") and the fourth, (that "the allegations as to plaintiff's intentions and allegations are not corroborated by the plaintiff.") The

Hatfield v. Malcolm.

answer to both of these grounds is that the order for defendant's examination is based on the pleadings, as well as the affidavit of plaintiff's attorney. Every allegation in the affidavit that is alleged on information and belief is contained in the complaint.

In our opinion, the papers on which the order was granted were sufficient, and the motion to set aside the order was properly denied.

The order appealed from should be affirmed, with costs.

BARNARD, P. J. and DYKMAN J. concurred.

HATFIELD RESPONDENT, *v.* MALCOLM, *et al*, THE
NEW AMSTERDAM REAL ESTATE ASSOCIATION,
APPELLANTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
JULY, 1893.

§§ 438, 439, 1626 *et seq.*

*Service by publication—with affidavit to procure order for sufficient—to re-
closure of mortgage—proofs—referee's oath.*

A corporation to which a deed of real estate has been given, is not a necessary party defendant, where the deed has not been recorded and where the grantor in the deed was the manager of the corporation, and was made a party defendant as the owner of the equity, of redemption.

Where the Sheriff was unable to find a defendant or his wife at his place of residence, and the plaintiff was informed at his residence that he had gone to Tennessee, and one of the defendant's brothers informed plaintiff that he was at the races at Monmouth Park

Hatfield v. Malcolm.

and could probably be found at a certain cafe, but was not found there, and neither his father nor his brother would give information where he could be found—*Held*, that these facts showed an extreme effort to make a service of the summons and complaint in the State, and it was fairly to be inferred that he was evading service by absence from the State or by concealment within the State. An order directing the service of a summons by publication need not contain the option that service out of the State be made personally.

Ritten v. Griffith (16 *Hun*, 454), distinguished.

An affidavit of publication of a summons seven weeks from July 15, to August 26th, 1892, both dates inclusive and another to the effect that it had been probably seven successive weeks beginning July 16th, 1892;—*Held*, sufficient.

An order of reference upon a default in an action to foreclose a mortgage is not jurisdictional.

An order of reference upon a default in an action to foreclose a mortgage, to examine a plaintiff as to the truth of the allegations of the complaint, where the complaint averred that there had not been any payments under which the plaintiff was examined and testified before the referee that there had not been any payments, *Held*, to be in due form.

The presumption is that a referee appointed to compute the amount due in an action to foreclose a mortgage has taken his official oath, and the facts that the papers are silent with respect thereto, does not require that a motion to set aside a judgment on that ground should be granted.

(*Decided July 28, 1898.*)

Appeal by the New Amsterdam Real Estate Association from an order of the Westchester County Special Term denying the motion for a judgment directing a foreclosure of a mortgage and a sale of the property covered thereby.

The facts are stated in the opinion.

John H. Clapp (*Jerolomon & Arrowsmith*, attorneys) for the New Amsterdam Real Estate Association, appellants.

H. T. Dikeman, for plaintiff, respondent.

Hatfield v. Malcolm.

BARNARD, P. J.—The plaintiff, on the 15th of March, 1892, conveyed certain property in Westchester county to the defendant, James W. Malcolm. Malcolm gave back a mortgage for a large part of the purchase money, payable by installments. The mortgage provided that, upon a default in the payment of any installment, the plaintiff was empowered to sell the premises, and out of the proceeds to pay the mortgage debt. A default was made on the 15th of June, 1892, in the payment of \$6,000, then due, and the plaintiff foreclosed, and sold the property, and bid it in for her debt. Soon after the sale by the plaintiff to Malcolm, he sold the property to the New Amsterdam Real Estate Association. This deed was not recorded when the foreclosure was instituted. Malcolm was the manager for the real estate company, and, pending the foreclosure, this company was fully informed of the proceedings, and took no action in respect to being made a party defendant, but continued to negotiate for delay, and the objection now made, that the company should have been made a party defendant, is without force. No deed was on record. Malcolm was its trustee, and a knowledge that he intended to convey to the company would not have justified the plaintiff in making the company a party until the deed was given.

The order for the publication was based upon sufficient evidence, and was in due form. The sheriff could not find either Malcolm or his wife in Westchester county. He had lived with his father at Mt. Pleasant. Inquiry there resulted in information that young Mr. Malcolm had gone to Tennessee. This was in June, 1892. In July, 1892, one of Malcolm's brothers informed the plaintiff's agents that his brother was at the races at Monmouth Park on the 4th of July, 1893, and he could be found, probably, at Munden's Cafe, Sixth avenue and Thirtieth street. He could not be found there. Neither his father nor his brother could give information where he

Hatfield v. Malcolm.

could be found. The papers show an extreme effort to serve him with the papers in the state, and fairly justify an inference that he was evading service by absence from the state, or by concealment within it. The order need not contain the option that a personal service out of the state be made personally. The case of *Ritten v. Griffith*, 16 *Hun*, 454, does not so hold. There a personal service out of the state was made without an order of publication, and such a service was held void. The affidavit of publication in the *Westchester County Reporter* was sufficient. It had a summons annexed to it, which was proved to have been published seven successive weeks, from July, 15, 1892, to August 26, 1892, both inclusive. The affidavit of publication in the *Eastern State Journal* is to the effect that an annexed summons had been published seven successive times, beginning July 16, 1892. The order of reference was not jurisdictional, and is in due form. It directed the referee to examine the plaintiff as to the truth of the allegations of the complaint. The complaint averred that there were no payments, and the plaintiff was examined, and so testified before the referee. As to the fact whether the referee took the official oath the papers are silent. The presumption is in favor of the performance of official duty. The order should therefore be affirmed, with the costs and disbursements.

DYKMAN and PRATT, J. J. concurred.

GALLIGAN v. HORNTAL.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
JULY, 1893.

§ 983.

Place of trial—action against public officer for libel—Motion imposing condition for denial.

An action against a public officer to recover damages for libel consisting of the publication of testimony taken by the defendant in his official capacity which is alleged to have been false, and to have been taken without jurisdiction is an action "against a public officer . . . for an act done in virtue of his office" within the meaning of section 983 *subd.* 2, of the Code of Civil Procedure, and is triable in the county where the cause of action or some part of it, arose.

The court cannot, as the condition of denying a motion to change the place of trial, require the plaintiff to withdraw one of her causes of action.

(*Dated July 28, 1893.*)

Appeal by both parties from an order of the Queens County Special Term, denying defendant's motion to change the place of trial of the action from Queens to New York County, and requiring plaintiff as a condition of the denial of the motion to strike out the third cause of action set forth in the complaint.

The opinion states the facts.

John J. Macklin, for plaintiff.

William N. Cohen (Hoadley, Lauterbach & Johnson, Attorneys), for defendant.

Thorn v. Beard.

DYKMAN, J.—William I. Thorn was a lawyer in the city of Poughkeepsie, and died on the 1st day of March, 1890. Having performed professional services for the defendant, he assigned his claim therefor to Peter B. Hayt on the 3d day of January, 1888, as collateral security for an indebtedness to Hayt, and for certain contingent liability as indorser of notes.

In May, 1889, Thorn commenced this action against the defendant to recover such claim. He obtained a judgment against Beard, which was affirmed at the general term (14 *N. Y. Supp.*, 339 s.c. 39 *St. Rep.*, 30) but reversed in the court of appeals (32 *N. E. Rep.*, 141.) Mary Thorn was substituted as the plaintiff.

Upon the new trial, after the reversal by the court of appeals, the defendant obtained a judgment for costs, and thereafter made a motion at the special term to compel Mr. Hayt to pay the costs, upon the ground that he was the party in interest for whose benefit the action had been prosecuted. The motion was denied, and the defendant has appealed from the order of denial.

The appeal cannot prevail, for the reason that an assignment of a cause of action as collateral security to an indebtedness of the assignor to the assignee is not such a transfer as makes the assignee liable for costs. *Peck v. Yorks*, 75 *N. Y.*, 421.

The order should be affirmed, with \$10 costs and disbursements.

press, and that an injurious article was published in the *New York Times* on the 11th of June, 1892; that the defendant told the *Times* reporter, that the language used by the plaintiff, as shown by the evidence of under-teachers, was "vile, immoral, and disgusting;" that the board of education removed the plaintiff from her position as principal. The plaintiff then sets forth the evidence, and it is injurious to the plaintiff. The answer makes denial of certain of the allegations of the complaint, and sets up the proceedings of the trustees, and claims them to be privileged, under the state of the pleadings. The defendant, who had demanded that the place of trial be changed from Queens county, which is designated in complaint, to the county of New York, made a motion to change the place of trial to New York. The motion is based upon the fact that the convenience of witnesses will be promoted by the change.

The motion ought to have been granted, as matter of right, under subdivision 2, section 983, of the Code.¹ The defendant is sued for an official act, and it is not made less official by a statement that the statements of the witnesses taken, were false and untrue, if the witnesses testify falsely, the testimony will protect those who act upon it, if they have not procured the false testimony, if it be taken in a regular proceeding. The complaint states that it was taken without notice. The answer states that it was taken upon notice, and thereby an official act is pleaded if the defendant's allegation is proven on the trial. The section as to the place of trial for official acts will be rendered futile if it be held not to be official by a denial of jurisdiction to do the act, and such a denial be deemed controlling upon the defendant. The convenience of witnesses will be subserved by a change of the place of trial. None of the witnesses on either side reside in Queens county.

The condition that the plaintiff shall withdraw the

Avery v. Avery.

third clause of the action is not within the power of the court to impose against the counsel of the plaintiff. She has a right to frame her complaint under the rules of law, and her action must be tried upon it. The order should be reversed, with costs to abide event, and the motion granted without conditions.

Costs of appeal to neither party as against the other.

AVERY v. AVERY, *et al.*

SUPREME COURT, FOURTH DEPARTMENT, ONONDAGO
COUNTY, SPECIAL TERM, SEPTEMBER, 1893.

§ 66.

Attorney's lien—who may maintain proceeding to enforce.

Section 66 of the Code of Civil Procedure gives an attorney a lien on a cause of action as against both his client and the adverse party, and its object is to secure to the attorney the payment by his client of the costs which may be recovered against his adversary. The claim against the client is the principal debt and the lien only a collateral security.

The attorney's lien for costs and compensation will be enforced as against the opposite party, where equity requires it, upon a motion of the lienor, by setting aside the settlement made between the parties without an attorney's consent and allowing the action to be prosecuted by the attorney in his own behalf.

If the settlement of an action between the parties thereto will prejudice the claim of an attorney against his client, or could in equity affect his interests in any manner, it will be set aside, no matter in how good faith it may have been made.

An attorney personally is the necessary actor in a proceeding to enforce his lien upon his client's cause of action for costs and compensation, and the client cannot institute a proceeding on behalf of his attorney, so that it may stand with its merits separate and apart from every other contingency in the action.

Avery v. Avery.

A motion for leave to prosecute an action for the enforcement of an attorney's lien will be denied where it does not appear that the interests of the attorney have been in any wise affected by settlement made between the parties and where it appears that his client possesses large financial means and that his claim for compensation for his services against the principal debtor is perfectly good.

Where the plaintiff in an action signed a stipulation discontinuing and settling the action, and thereafter the defendant, instead of securing an order discontinuing the action, served an answer setting up such stipulation as a defense, and the plaintiff claimed that the stipulation was obtained by fraud—*Held*, that an order should not be granted substituting the plaintiff's attorney in his place as plaintiff and permitting him to prosecute the action for the enforcement of his lien for services.

(Decided September 2, 1893.)

Motion by the plaintiff to discontinue the action as to Charles E. and Clayton D. Avery, for an order allowing the action to be continued by his attorney against the other defendants for the purpose of enforcing his statutory lien for costs. The opinion states the facts.

Irving G. Hubbs, for plaintiff and motion.

Arthur B. Rider, for defendants, opposed.

WRIGHT, J.—This action was brought for the foreclosure of a mortgage, on which the complaint alleges \$65 was due as interest, which the verified answer denies. From the plaintiff's papers it appears that before the answer was served the defendant, Charles Avery, in an interview with the plaintiff, stated to him that he had paid the costs of the action to the plaintiff's attorney, Mr. Irving G. Hubbs, and that said attorney had written a letter to him, the plaintiff, stating that fact and requesting the plaintiff to sign a stipulation discontinuing and settling the action; and he also exhibited to the plaintiff a letter to that effect, purporting to be signed by said attorney.

Avery v. Avery.

That the plaintiff thereupon, believing said statements to be true and the letter to be genuine, signed the stipulation; that said statements were false and the letter a forgery. After the stipulation was executed and delivered to the defendant Charles Avery, he, instead of moving for an order to discontinue the action, served his answer, setting up, among other things, said stipulation as a defense. The plaintiff now asks the intervention of the court to relieve his attorney from the effect of the stipulation which the plaintiff himself has made, on the ground that the stipulation cuts off his attorney's statutory lien for costs. Omission to consider the logic of the statute in many cases has caused considerable chaos in the decisions respecting the attorney's lien. The statute gives the attorney a lien on the cause of action as against both his client and the adverse party. The object of the lien is to secure to the attorney the payment by his client of the costs which may be recovered against his adversary, and any other agreed compensation for his services, out of the proceeds of the action. The claim against his client is the principal debt. The lien is only a collateral security. Courts will enforce this lien, as against the opposite party, upon the motion of the lienor, where equity requires it, by setting aside a settlement made between the parties without the attorney's consent, and allowing the action to be prosecuted by the attorney in his own behalf. Some cases have held that a settlement by the parties will not be set aside unless it was collusively made by them for the purpose of cheating the attorney out of his compensation, but such fraudulent purpose is not essential if the settlement have the effect of cheating the attorney. If it prejudices his claim against his client, or inequitably affects his interests in any manner, it will be set aside, no matter in how good faith it may have been made. But in this case the lienor does not ask the enforcement of his lien. It does not ap-

Avery v. Avery.

pear that he personally desires to take upon himself the burden of the prosecution for his own benefit and at his own risk, but the plaintiff makes the motion on behalf of his attorney. The rights and interests of the client are in the keeping of his attorney, and it is a sacred trust; but to hold conversely that the rights and interests of the attorney are in the keeping of the client would be a unique proposition indeed. The attorney personally is the necessary actor in the proceeding to enforce his own lien. The client cannot institute the proceeding on behalf of his attorney, so that it may stand with its merits separate and apart from every other contingency in the action. *Murray v. Jibson*, 22 *Hun*, 386; *Wehle v. Conner*, 83 *N. Y.*, 231; *Oliwill v. Ferdenhalven* (*City Ct. N. Y.*) 7 *N. Y. Supp.*, 99. Further, had the attorney made this motion personally, it would fail, because it does not appear that the interests of the attorney have been inequitably affected by the settlement, and it appears that his client possesses large financial means and that his claim for compensation for his services against the principal debtor is perfectly good. There is, therefore, no reason for the attorney to invoke the courts for the protection of his lien. *Pitcher v. Robertson* (*Sup.*) 21 *N. Y. Supp.*, 66; *Roberts v. Doty*, 31 *Hun*, 128; *Root v. Van Duzen*, 32 *Hun*, 63; *Washburn v. Mott* (*Cir. Ct.*), 12 *N. Y. Supp.*, 111; *Hart v. Mayor, etc.*, 69 *Hun*, 237, 23 *N. Y. Supp.*, 555. Further, the questions involved in this motion can best be determined on the trial of the action in the form in which it is now pending.

The defendants, in their papers, deny the allegation of fraud in connection with the settlement, and have set up the stipulation as a defense in their answers, and have thus invited the trial of its validity as one of the issues before a jury. The order asked for would change the issues thus proffered and the course of the trial; would, in effect, drop out the plaintiff and substitute the attorney

Garland v. Van Rensselaer.

in his stead, and eliminate the question of fraud from the issues at the request of the party who is here complaining of fraud. This ought not to be permitted, since the plaintiff, upon returning the \$65, will, under the pleadings, have the right to submit to the jury the question of fraud in the settlement, and thus a more full and complete investigation may be had of the facts than can be had from the papers presented on this motion. The action may be discontinued as against the defendants Clinton E. Avery and Clayton D. Avery upon the payment of \$10 costs before notice of trial, but the remainder of the motion is denied.

GARLAND, *et al*, RESPONDENTS, *v.* VAN REN-
SELAER, IMPEADED, ETC., APPELLANT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
JULY, 1893.

§§ 1010, 1021.

Demurrer—form of decision—judgment.

An order overruling a demurrer to the complaint in an action, and directing judgment in favor of the plaintiff unless the defendant paid costs and served an answer within twenty days, is a sufficient decision within the meaning of section 1010 of the Code of Civil Procedure; the order for judgment was final if the terms were not accepted, and such terms not having been complied with, final judgment thereupon entered was regular.

(Decided July 28, 1893.)

Appeal by defendant Van Rensselaer from an order of the Westchester county special term denying his motion

Garland v. Van Rensselaer.

to vacate a judgment entered on an order overruling a demurrer interposed by him to the complaint.

The opinion states the facts.

Isaac N. Miller (*Howard Allison*, attorney) for defendant, appellant.

Charles P. and Justin A. B. Cowles (*E. B. & C. P. Cowles*, attorney) for plaintiffs, respondents.

BARNARD, P. J.—The defendant Van Rensselaer demurred to the complaint of the plaintiffs. The demurrer was overruled, and judgment ordered in favor of the plaintiffs therein, with leave to the defendant to answer within 20 days, upon the payment of \$20 costs. The order was entered on the 28th of January, 1893, and a copy, with notice of the entry thereof, was served on the attorney for the defendant on the 3d of February, 1893. The costs were not paid, and no answer was served within the time. The plaintiff entered judgment upon the demurrer in his favor March 1, 1893.

The demurring defendant made a motion to set aside this judgment as irregular, in that no decision had been made and filed under sections 1010 and 1021 of the Code.* The order for judgment was a sufficient decision under section 1010 of the Code. *Eaton v. Wells*, 82 *N. Y.* 576; *Wood v. Lary*, 20 *N. Y. Civ. Pro.* 136.

* The authorities differ as to the form of the decision to be made on the trial of an issue of law. See in addition to the cases above cited, *Gilman v. Prentice* 22 *N. Y. Civ. Pro.*, 148; *Thompson v. Stanley* 22 *Id.*, 431 and note; *Village of Palmyra v. Wynkoop*, 17 *Id.*, 187; *Hecia Con. Gold Mining Co. v. O'Neill*, 23 *Id.*, 143 and note.

Peck v. Dickey.

The order for judgment was final if the terms were not accepted, and the judgment was regular, under section 1021, for that reason.

The order should be affirmed, with costs and disbursements.

PRATT, J., concurred.

PECK v. DICKEY, *et al.*

COUNTY COURT OF ROCKLAND COUNTY, SEPTEMBER, 1893.

§ 340.

County courts—jurisdiction when and how to appear.

A county court is a court of limited jurisdiction, and, therefore, the plaintiff in an action therein must allege facts showing the jurisdiction of the court.

Gilbert v. York (111 N. Y. 544) followed.

A county court has jurisdiction of an action to recover chattels the aggregate value of which does not exceed \$1,000, where the chattels are within the county and it is not necessary that it appear that the defendant is a resident of the county or that he should be such.

(Decided September 5, 1893.)

Demurrer to complaint on the ground (1) that it did not state a cause of action; (2) that the court did not have jurisdiction of the subject-matter of the action; and (3) that the court did not have jurisdiction of the persons of defendants.

Peck v. Dickey.

Arthur S. Tompkins, for plaintiff.

George A. Wyre, for defendants.

WEIANT, J.—This is an original action in the county court to recover the possession of certain chattels alleged in the complaint to be of the value of \$400, and wherein judgment is demanded for the possession of the property, and for the value thereof in case a delivery cannot be had, and damages to the amount of \$800. The complaint contains no allegation as to the place of residence of the defendants. To this complaint the defendants demurred, on the grounds that the complaint does not state facts sufficient to constitute a cause of action; that the court has not jurisdiction of the subject-matter of the action; and that the court has no jurisdiction of the persons of the defendants. Upon the trial of the issues of law thus raised, the only point urged to sustain the demurrer was that the plaintiff, in order to show the jurisdiction of the court, is bound to allege that the defendants were residents of the county at the time of the commencement of this action. The county court is a court of limited jurisdiction, and, that being so, it is requisite that the plaintiff, in his complaint, should allege the facts necessary to show the jurisdiction of the court. The presumption is that a court of inferior jurisdiction is without jurisdiction when the jurisdictional facts are not alleged in the complaint in an action therein (*Gilbert v. York*, 111 *N. Y.*, 544, 19 *N. E. Rep.*, 268); and county courts are affected by such presumption (*Id.*) In the case cited, which was an action to recover a money judgment, it was held, upon demurrer, that an averment in the complaint that the defendant is a resident of the county is necessary, and that the omission of such averment is, under the Code, a ground for demurrer, as the defect appeared on the face of the complaint. Such is the law as laid down

Peck v. Dickey.

by the highest court of this state, and, if applicable to this case, the demurrer is well taken. It therefore becomes necessary to inquire and determine whether or not there is any distinction between that case and this.

The jurisdiction of county courts is prescribed by section 340 of the Code of Civil Procedure. It is there enacted that "the jurisdiction of each county court extends to the following actions and special proceedings in addition to the jurisdiction * * * conferred * * * by special statutory provision." Subdivision 3 of that section provides for an action of this class. The jurisdiction of county courts is there extended "to an action for any other cause where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding one thousand dollars; or to recover one or more chattels the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof." If the words, "where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county," are applicable to an action to recover chattels, then the case of *Gilbert v. York*, *supra*, is decisive of this, and the demurrer is well taken. I have been unable, after thorough search, to find any authority wherein this point has received consideration. The question, therefore, comes to me for determination without the aid of other judicial or legal authority or consideration. It is clear that, under subdivision 3 of the section of the Code cited, the legislature intended to bestow jurisdiction over two different and separate classes of actions, and therein specified them as one for "a sum of money only," not exceeding \$1,000, and the other "to recover chattels," the aggregate value of which shall not exceed that sum. It

would seem that it was the intention to provide for each class of actions in the separate parts of the subdivision, completely and distinctly, and independently of the other, in like manner as if a distinct subdivision had been enacted to cover each class. As to the first class jurisdiction is conferred where the defendant is, or defendants are all residents of the county, and the complaint demands judgment for a sum of money only ; as to the second, where the action is to recover chattels, the value of which does not exceed the sum also prescribed. The two classes are separately and distinctly specified by phraseology and punctuation. If it were the intention of the legislature to bring both classes of actions within all the terms of the whole subdivision as to residence and otherwise, would not the words as to residence of the defendants, or words expressing like requirements, have been most probably added as to the latter class of action ? In the other subdivisions of this section 340, jurisdiction is conferred where the situs of the property is within the county, and the residences of the parties are not made essential ; and such has been the determination of the courts. Is it not reasonable to assume that in this class of cases the same intent prevailed, in the enactment of subdivision 3, as in such other subdivisions where the jurisdiction is made to rest upon the situs of the property, or upon its situs and value ? It may be noted that in each of the other subdivisions of this section of the Code each class of cases is separately and distinctly provided for, and each, as here, separated by a semicolon, indicating the disconnection of the classes. In subdivision 1, several classes are specified, and then the words " where the real property to which the action relates, is situated within the county," are added after all. That makes it perfectly clear that the location of the property applies to each class of actions thereinbefore enumerated, and without consideration of the place of residence of the parties. If the matter of residence was

Peck v. Dickey.

intended to apply to both classes of actions specified in subdivision 3, why not have added the words "in like manner as to residence," at the foot of the subdivision, thus making it equally clear as in subdivision 1? Again, at the close of subdivision 1, jurisdiction is given of an action to foreclose a lien upon a chattel, where the lien does not exceed \$1,000 in amount, "and the chattel is found within the county." The situs of the chattel and the value are made the essentials to jurisdiction, and not the residence of the parties, or either of them. Is it not quite in accord to assume that the same intent prevailed in the use of like words, in subdivision 3, where the contrary is not manifested by clear expression? If it were the intention to have the provision as to residence of the defendants apply in an action of this class, is it not reasonable to infer that the phraseology and arrangement of words as the same appear in subdivision 1 would have been followed, the classes of actions being all enumerated, and then the specific essential or essentials added, applying to all? Following the construction of subdivision 1 in the formation of subdivision 3, and we should have expected it to read as follows:

Still, further, if the requirement as to residence is to apply to an action of this class, would not the construction or formation and the language have been differently written? We find the words "to recover" at the beginning of the sentence providing for cases of this class; and these evidently must be carried back to the beginning of the subdivision, and there connected, and read after the words "to an action," and the provision is then complete as to the class of actions to recover chattels. If that be not so, then why use those words "to recover?" Would it not have been just as appropriate, and more specific and clear, to have continued after the words "dollars," at the end of the provision as to the first class of actions, and then added "or where the complaint demands the recovery of

one or more chattels," etc., to the end. It may also be observed how specifically the requirement as to either the residence of the parties or the situs of the property, or both, is prescribed in each class of proceedings designated in subdivision 4 of this same section. Throughout the whole section, the requisite essentials of jurisdiction are particularly specified for each class of cases, and it is not probable that the legislature intended to depart from this exactness as to this one class of actions.

Another circumstance, I think, may be invoked to sustain the construction of this subdivision of the Code for which I have advanced the foregoing suggestions. The provision of the Code as to the place of trial of actions discloses a purpose therein to recognize a distinction between local and transitory actions. It is based upon the subject matter of the action, where the action is brought to recover money only, and does not involve the title, disposition, or possession of property. The county of the residence of one or the other of the parties is generally made county of trial, but where such interest in, disposition, or the possession of, property is the purpose of the action, the residence of the parties is not considered material. It seems that such a distinction was in mind in framing such provisions of the Code, and it may well be that in enacting this section 340 thereof, as to the jurisdiction of county courts, a like intention prevailed. The case of *Burns v. O'Neil* (10 *Hun*, 495), cited by the defendants' counsel, is not in conflict with the construction adopted. That was an action for money only, and as to such an action it is clearly settled, as we have seen, that the complaint must allege the residence of the defendants to be within the county. The demurrer is accordingly overruled, with the privilege to the defendants of answering, upon payment of the trial fee.

Hadley v. Pethcal.

HADLEY v. PETHCAL, *et al.*

SUPREME COURT, FOURTH DEPARTMENT, BROOME COUNTY,
SPECIAL TERM, OCTOBER, 1890.

§§ 3228, 3236, 3251.

Costs—of motion for new trial discretionary—to abide event.

The costs of a motion at special term for a new trial in an action at law, made upon a case, are in the discretion of the court.

Where the discretion of the court, as to the award of costs of a motion for a new trial, has been fairly exercised, and the order thereupon made is not appealed from, the determination is final.

Where a motion for a new trial was granted at special term "with costs to defendant to abide the event" the plaintiff upon succeeding on a new trial, cannot tax the costs of such motion.

(Decided October 11, 1893.)

Motion by defendant for a new taxation of costs.

The facts are stated in the opinion.

Alexander Cummings, for defendant and motion.

A. F. Gladding, for plaintiff, opposed.

FORBES, J.—The plaintiff in this action recovered a verdict at the Broome circuit, against the defendants, for about \$3,300, and a judgment was entered thereon. A motion was made before the justice who held the circuit for a new trial upon a case and exceptions, under section 1002 of the Code of Civil Procedure. The judgment was set aside at the special term, and a new trial was granted

with costs to the defendants to abide the event. No appeal was taken from the order granting a new trial, or from the judge's determination of the question of costs upon that motion. A retrial was had at the circuit, and the plaintiff recovered a verdict of \$400. Upon taxation of the costs by the plaintiff before the clerk of Broome county, the costs of the motion for a new trial—an item of \$60—was allowed by the clerk, against the objection of the defendants. It is claimed on the part of the plaintiff that; having succeeded finally in the action, he is entitled to costs, in all stages of the action, as of course, under sections 3228 and 3251 of the Code of Civil Procedure. The defendants claim that, from the peculiar phraseology of the order granting a new trial to them, the plaintiff is not entitled to tax the costs of the special term in his favor, and this is the only question for discussion upon this motion.

I have thus far been unable to find any authority absolutely decisive of the question here presented. The action is an action at law. The cases cited by the moving parties are cases in equity, in which it must be conceded that the costs are in the discretion of the court; while, on the other side authorities have been cited which only have reference to the determination of an action upon appeal to the court of appeals, leaving the question an open one, in an action at law, where the order was not appealed from, and the case was retried from the circuit. After such examination as I have been able to give the question, I am convinced that the plaintiff is not entitled to tax, as a part of his recovery, the costs of the special term—First, because the costs upon a motion for a new trial, fall within section 3236 of the Code of Civil Procedure, and are in the discretion of the court. That discretion has been fairly exercised, the provisions of the order unappealed from and the determination is therefore final. *Clark v. Sullivan* (*Sup.* 10 *N. Y. Supp.*, 397; *Siegrist v.*

Hadley v. Pethcal.

Holloway, 7 *N.Y. Civ Pro.* 58; *Cutlery Co. v. Rowe*, 5 *Abb. N. C.*, 142; 2 *Rum. Pr. p.* 442). In the last authority cited, the following language is used :

"Where a motion is made on a case, the costs are in the discretion of the court. The costs upon such a motion are fixed by section 3251 of the Code. Where the motion is made upon the minutes, the costs are also in the discretion of the court, and if allowed, are only ten dollars."

In Abbott's Annual Digest for 1887, at page 92 (paragraph 37), the following language is used :

"Where the defendant is defeated at a trial, and succeeds upon appeal in having the judgment reversed, with costs 'to the appellant' to abide the event, and the plaintiff succeeds upon the new trial, he cannot tax in his favor, the costs upon the appeal;" citing the case of *Bannerman v. Quackenbush*, 2 *City Ct. R.*, 172.

From an examination of this authority, reported elsewhere, I do not find that the note is sustained by the case as digested. But see *Trust Co. v. Whiton* (17 *Hun*, 593), *Howell v. Van Sieten* (4 *Abb. N. C.*, 1; and note, affirming 8 *Hun*, 524). If I am right in my conclusion that the costs on a motion for a new trial are in the discretion of the court, then there is no difference in the principle to be applied, whether the action is one of equity or at law. *Copper Co. v. Dimmock* (29 *Hun*, 299). Then the cases of *Durant v. Abendroth* (48 *Hun*, 16), and the *House v. Lockwood* (48 *Hun*, 550), may be used to sustain the contention of the defendants, and the case of *Thomas v. Evans* (*Hun*, 442), would be directly in point, as sustaining the discretionary power of the justice who granted the new trial.

Secondly, the rule contended for by the defendants ought to prevail as the law in cases of this character, and particularly in the case at bar. The verdict of the jury,

Hadley v. Pethcal.

concededly wrong, was set aside by the justice who held the circuit; and without any appeal from his order, which gave costs to the defendants to abide the event of the action, a new trial is had at the circuit, and a jury give but a small portion of the original damages. If the plaintiff is correct in his construction that his right to costs falls within section 3228, then he is in the position of winning at the special term, by compelling the defendants to pay for the reversal of his former erroneous judgment at the circuit. *Sheridan v. Genet* 1 *N. Y. Civil Pro.* 309, and note; *Durant v. Abendroth*, (*Sup.*) *N. Y. Supp.* 538. See note to *Sanders v. Townshend*, 11 *Abb. N. C.* 217. The construction given to a direction by the court of costs to a particular party, as applied to a set off of costs, is decided adversely to plaintiff in the case of *Murphy v. Telegraph Co.* (*City Ct. N. Y.*) 9 *N. Y. Supp.* 28, under section 779 of the Code of Civil Procedure. It will be seen by the cases cited by the plaintiff that the rule there contended for is one established by the court of appeals as to costs, in reference to the effect of its own decisions, upon a final judgment in that court. *Murtha v. Curley*, 92 *N. Y.* 359. But that rule is not applicable where the costs at the special term or the circuit are in the discretion of the court. *In re Water Comr's of Amsterdam*, (104 *N. Y.* 677, 10 *N. E. Rep.* 545), where the case in 92 *N. Y.* 359, *supra*, is distinguished, and the following head-note is given: "The words 'with costs,' in an order of affirmance or reversal in this court, in a case where the allowance of costs is discretionary, means costs in this court only."

The motion for a new taxation before the county clerk of Broome county must therefore be granted, under a proper order, with \$10 costs of this motion to the defendants, to be deducted from the judgment and execution in this action.

Rogers v. Earle.

ROGERS v. EARLE.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM, SEPTEMBER, 1893.

§ 2244.

Jurisdiction—of justices in summary proceedings—equitable defenses.

Under section 2244 of the Code of Civil Procedure, as amended in 1893, a tenant may plead in summary proceeding an equitable defense, which will defeat the proceedings in whole or in part, but he cannot obtain any affirmative relief against the landlord, and the tenant where he is entitled to affirmative relief, instead of pleading his equitable defense or counter-claim, may invoke the aid of a court of equity at once, and where he does so the court of equity will enjoin the summary proceedings instituted by his landlord until the determination of the action.

Becker v. Church (115 N. Y., 562), followed.

It seems that parties may stipulate away their rights and remedies, and that jurisdiction must depend not upon inference or intendment, but must be expressly conferred.

(Decided September 18, 1893.)

Action for the rescission of certain contracts and for other equitable relief.

The facts are stated in the opinion.

T. E. Stewart and E. H. Benn, for plaintiff and motion.

R. Davidson and L. L. Miller, for defendant, opposed.

Rogers v. Earle.

MCADAM, J.—The defendant, who is the lessee from the Lorillard estate of the property known as “Earle’s Hotel,” made an underlease to the plaintiffs for a term commencing February, 1893, and ending May 1, 1899, when the first term of the defendant’s lease from the Lorillards will expire. The plaintiffs, at the same time, purchased certain furniture and fixtures in the hotel for \$25,000, in addition to the rental agreed to be paid, which is \$24,000 a year; and the defendant, at the expiration of the term, is to transfer the ground lease to the plaintiffs, so that they may procure the renewal thereof from the ground landlord. The lease from the Lorillards requires the defendant to pay all taxes and assessments upon the property, and in the event of nonpayment the rights of the lessees are liable to forfeiture. It appears that the defendant, to induce the plaintiffs to enter into the contracts aforesaid, represented that all the taxes had been paid, a representation which subsequently proved untrue, as it appeared on examination that the taxes were unpaid for the years 1889, 1890, 1891 and 1892, and aggregated over \$15,000. This impairs the plaintiff’s estate to that extent, as well as rendering it liable to forfeiture whenever the Lorillards seek to enforce their right thereto. The plaintiffs have, therefore, filed their bill in equity for the rescission of the contracts, the annulment thereof, and, besides other incidental relief, they ask that certain summary proceedings instituted by the defendant as landlord be enjoined until the determination of the action. *Becker v. Church* (115 *N. Y.*, 562), is precisely such a case and is authority for the injunctive relief prayed for. That, like this, was a suit in equity by a tenant to annul a lease, and the court held that he was entitled to an injunction restraining the landlord from prosecuting summary proceedings during the pendency of the action. Indeed, by the lease itself, the defendant made his right to institute summary proceedings depend-

Rogers v. Earle.

ent on his compliance with all the terms of the Lorillard lease, and parties may, it seems, stipulate away their rights and remedies. *In re* New York, L. & W. R. Co. (98 *N. Y.*, 452, 453); *Vose v. Cockcroft*, 44 *N. Y.*, 415, 423, 424; *Elliot v. Wood*, 45 *N. Y.*, 71. The case presented is, by the allegations and proofs, brought within the rule that an injunction may issue where the defense is of an equitable character, which the court entertaining the proceeding cannot administer to meet all exigencies and requirements. *Balloton v. Seignett*, 2 *Abb. Pr.*, 121; *McIntyre v. Hernandez*, 7 *Abb. Pr. (N. S.)*, 214. See, also, *Railway Co. v. Ramsey*, 45 *N. Y.*, at page 647. The statute respecting summary proceedings, in effect, establishes the same rule by declaring that they may be stayed by injunction where a similar stay would be granted in an action of ejectment (Code, § 2265), and such a stay was always allowable in cases of equitable defenses not available in a common-law action (High Inj., § 63; Hil. Inj. [3d Ed.], p. 660, § 4). But the defendant contends that all this has been changed by the amendment to section 2244 of the Code, passed in 1893, whereby a tenant is authorized to plead to a summary proceeding any defense, legal or equitable. True, the amendment does so provide, and if the plaintiffs can obtain all the relief they require by means of such a defense they require no aid from a court of equity. But the amendment serves no such purpose. The power conferred must be considered with reference to the limited jurisdiction to which it is attached, and, so construed, it affects the procedure only by enlarging the number of defenses which a tenant may interpose to protect his possession. It confers no equity jurisdiction upon the courts enumerated.

District courts are of statutory creation, and their jurisdiction must not depend upon inference or intentment, but must be expressly conferred. Even the form

Rogers v. Earle.

of judgment therein is prescribed, and this whether the proceeding is tried by the court with or without a jury. There is no provision for special verdicts or findings by the court or jury, and nothing authorizing a decree adjusting and enforcing equities between parties. The equitable defense or counterclaim contemplated by the amendment of 1893 is evidently one which goes to defeat the proceeding in whole or part. The power conferred stops there and goes no further. This will not furnish the relief the plaintiffs require, which is of an affirmative character, extending beyond that which the district court may administer and which no tribunal but a court of equity can grant. In such a case it must be evident that the aggrieved party may, instead of seeking relief on the instalment plan—part in the district court and part elsewhere—invoke the aid of a court of equity at once and dispose of the entire contention in one proceeding. Where power to entertain equitable defenses or counterclaims is conferred upon courts of law, it is necessary, in order to determine the measure of power conferred, to inquire whether the court is already possessed of equity jurisdiction, for in such instances the meaning is that such power is to be applied in aid of the defense or counterclaim that all questions may be determined by the same judgment; but, if the court upon which the power is conferred has no equity jurisdiction, then the power must, in the nature of things, be limited wholly to defensive purposes, and is available only so far as may be necessary to make the same effective. It is to be used as a shield, not as a sword. Interposing an equitable defense does not turn an action or proceeding into an equitable one. *Webster v. Bond*, 9 *Hun*, 437.

The amendment of 1893 never contemplated that the jurisdiction of the old court of chancery should attach to inferior jurisdictions to the extent of enabling them to grant, under the title of "equitable defenses or counter-

Rogers v. Earle.

claims," affirmative equitable relief of the nature afforded by a cross bill or otherwise. It merely designed that certain minor matters, formerly the subject of a bill in equity, might, without that formality, at the option of the tenant, be used by him to defeat the summary remedy. Indeed, the act may be broad enough to defeat an injunction where the power conferred is adequate to answer all possible requirements; but where, as in this case, further relief of an affirmative character is needed, jurisdiction now as formerly may be invoked. This power existed in courts of equity long before the amendment of 1893, and continues notwithstanding it. *Railway Co. v. Ramsey*, 45 *N. Y.*, at page 649; *Popfinger v. Yutte*, 102 *N. Y.* 38, 6 *N. E. Rep.* 259; *Shepard v. Railroad Co.*, 131 *N. Y.* 215, 30 *N. E. Rep.* 187. Although it was intended that district courts might, within the scope and in the exercise of their limited jurisdiction, consider equitable as well as legal defenses, their powers were not otherwise extended by express enactment, and cannot be by implication or intendment. These courts have neither the machinery nor procedure essential to the exercise of that system of jurisprudence which was exercised and perfected by the old court of chancery, which had no restraint upon it but certain settled rules and the conscience of the chancellor. The case of *Capet v. Parker*, (3 *Sandf.* 662,) serves to illustrate the principle sought to be applied. There the tenant, after the tenancy had commenced, contracted to purchase the property. The landlord failed to convey and instituted summary proceedings to remove the tenant on the ground of holding over. The tenant thereupon filed a bill for specific performance of his contract of purchase, and this court enjoined the prosecution of the summary proceeding upon the ground that there were equities involved which the justice entertaining the summary proceeding had no jurisdiction to determine. It is clear that even the amendment of 1893,

Compton v. Bowne.

in regard to equitable defenses or counterclaims, would not give the tenant, in such a case, the relief he required. The inferior court could not, under that amendment, decree or enforce specific performance against the landlord. The most it could do would be to find for the tenant on equitable grounds, leaving either party to seek the necessary substantial relief in a court having equity jurisdiction. Two trials would be made necessary, instead of one. Equity abhors a multiplicity of suits and will enjoin against them when it can.

Under the circumstances, the rule enforced in *Becker v. Church*, *supra*, must be applied, and the injunction continued, with \$10 costs, to abide event.

COMPTON, RESPONDENT, v. BOWNE, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM,
OCTOBER, 1893.

§§ 385, 386.

Limitation to action—payment when does not extend time of—mutual accounts.

An exception to the denial of motion to dismiss the complaint in an action, and also for the direction of a verdict in defendant's favor on the specific ground that the claim in suit was barred by the statute of limitations, raises a question of law, for the determination of which, on appeal, it is not necessary that the record should purport to contain all the evidence.

The effect of part payment in defeating the operation of the statute of limitations depends upon the promise it implies to pay the residue, and if the payment is intended not as a discharge *pro tanto*, but as a complete liquidation of the entire demand, an engagement to pay more cannot be inferred and the operation of the statute is not defeated.

Compton v. Bowne.

An account consisting of debits on one side and credits on the other is not a mutual open and current account where there have been reciprocal demands between the parties within the meaning of the statute of limitations.

Payment in discharge of the balance of a closed account and in final settlement of the transactions between the parties, is not an item in an "open and current account" from which a cause of action accrues and the statute of limitations begins to run.

(Decided October, 1898).

Appeal by defendant from a judgment of the general term of the City Court of New York, affirming a judgment entered at trial term upon a verdict in favor of plaintiff, for an alleged balance of commissions earned by plaintiff upon sales of cargoes of coal, for the defendant.

The opinion states the facts.

James L. Bishop, for defendant, appellant.

Hyland & Zubriskie, for plaintiff, respondent.

PRYOR, J.—Upon the conclusion of plaintiff's evidence the defendant moved to dismiss the complaint on the specific ground that the claim in suit was barred by the Statute of Limitations; and again, at the close of the case, for the same reason, he requested the direction of a verdict in his favor.

To enable us to determine whether, in denying the motions, the court below committed legal error, it is not necessary that the record should purport to contain all the evidence (*Remsen v. Wheeler*, 3 *Silvernail Ct. of App.*, 43; *Halpin v. Ins. Co.*, 118 *N. Y.*, 165). The exception to the denial of the motions duly presents the question for adjudication (*Turner v. Weston*, 133 *N. Y.*, 650, 651).

It is conceded that the Statute of Limitations is a conclusive answer to the action, unless the defense be obviated by the payment on the 7th of June, 1882. The legal effect of that payment is the solitary question before us.

Treating the payment as on account of a claim

Compton v. Bowne.

against which the statute was running, its inefficacy to prevent the bar is plainly apparent. By the uncontroverted evidence, the payment was of the balance of account between the parties, and was intended by the defendant in full settlement of his entire indebtedness to the plaintiff. "The account on February 15th stood to his credit \$359.54. I added interest to June 7th, \$6.78, which made \$366.42. * * * I gave him a check on June 7th, 1882, adding interest from February 15th. The amount was \$366.42. * * * This closed the whole business." To the same effect is the testimony of the plaintiff himself; "I received a sum of money from him by check, dated June 7th, 1882, \$366.42. That sum was the balance shown by his account * * * just the sum which Mr. Bowns admitted to be due to me."

It is elementary law that the effect of part payment in defeating the operation of the Statute of limitations depends upon the promise it implies to pay the residue: but if the payment be intended, not as a discharge *pro tanto*, but as a complete liquidation of the entire demand, how can an engagement to pay more be inferred? The implication of an acknowledgement of the continuance of the debt from an act supposed and designed to extinguish it, and of a promise of further payment from a payment made and intended as final and complete, is a palpable absurdity *Arnold v. Downing*, 11 *Barb.*, 554; *Harper v. Failey*, 53 *N. Y.* 442; *Sands v. Gelston*, 15 *Johns*, 511; *Hale v. Morse*, 49 *Conn.*, 481; *Weston v. Hodgkins*, 136 *Mass.*, 326; *Rensons v. Clark*, 59 *Mich.*, 414; *Wood on Lim.*, sec. 97; *Buswell on Lim.*, sec. 77).

Apprehending the force of the foregoing argument, the respondent seeks shelter under section 386 of the Code of Civil Procedure; but this provision is as ineffectual as section 395 to rescue his claim from the operation of the statute. For in the first place, the account, consisting apparently of debits on the one side and payments on the

Kingsford v. Butler.

other, is not the "mutual, open and current account, where there have been reciprocal demands between the parties" contemplated by the statute (*Green v. Disbrow*, 79 *N. Y.*, 1), and, in the second place, if it be such an account, still the payment relied on to defeat the statute, being in discharge of the balance upon a closed account and in final settlement of the transactions between the parties, cannot in the nature of things, be that "item" in an "open and current account" from which the cause of action accrues and the Statute of Limitations begins to run. The proposition is so self-evident as to dispense with argument to elucidate and sustain it. It is an inevitable corollary from the reason of the rule of limitation applicable to mutual accounts (*Green v. Disbrow*, 79 *N. Y.*, 1, 10; *Gunn v. Gunn*, 58 *Am. Rep.*, 447, 454).

Judgment reversed and a new trial ordered; costs to abide event.

BOOKSTAVEN, P. J., and BISCHOFF, J. concurred.

KINGSFORD, RESPONDENT, v. BUTLER, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM,
SEPTEMBER, 1893.

§§ 2916, 2918, 3063.

Justice's court—judgment by default—where attachment issued—when justice should dismiss action—appeal.

The only statute giving a justice of the peace authority to enter judgment against a defendant on default without personal service of the summons upon him is the provision of section 2918 of the Code of Civil Procedure, which provides that judgment may

Kingsford v. Butler.

be entered if the defendant's property has been duly attached by virtue of a warrant of attachment that has not been vacated, and in that case it is only presumptive evidence of indebtedness and can be satisfied by execution only against the property so attached.

It is the duty of a justice of the peace, on the return of a summons which has not been personally served, to enter judgment by default only where the records show an attachment lawfully and regularly executed, and where the attachment was issued upon an insufficient affidavit and there has been no personal service of the summons or appearance of the defendant, the justice has never acquired the jurisdiction over the person of the defendant, the defendant's property has never been duly attached, and a judgment entered by default is unauthorized and should be reversed on appeal.

The objection that a justice of the peace, who has, without the personal service of the summons upon an attachment improperly issued, rendered judgment against a defendant was without jurisdiction so to do, and is not a technical one, and, therefore, his judgment cannot be affirmed under section 8063 of the Code of Civil Procedure, providing that on appeals from justices' courts and appellate courts must render judgment according to the justice of case without regard to technical errors and defects which do not affect the merits and it cannot be said that the objection is technical simply because the defendant does not appear to contest the validity of the debt sued upon.

(Decided September 23, 1893.)

Appeal by the defendants from a judgment of the Oswego County Court, affirming a judgment of a justice's court entered by default.

The facts appear in the opinion.

D. P. Lester, for defendant, appellant.

L. W. Baker, for plaintiff, respondent.

PARKER, J.—The facts disclosed by the appeal book in this action are substantially as follows: A justice of the peace issued a summons in favor of this plaintiff against the defendant upon the 13th day of August, 1892. At the same time he issued a warrant of attachment against the defendant's property. The attachment was levied by the constable on certain personal property of

Kingsford v. Butler.

the defendant, and a certified copy of it and of an inventory of the property so levied upon and of the summons were each left by the constable at the defendant's last place of residence with a person of suitable age and discretion. No personal service of the summons was ever made upon the defendant, nor any service other than as above stated. The affidavit upon which the warrant of attachment was issued was wholly insufficient to give the justice jurisdiction. The case of *Bump v. Dehany*, 12 *N. Y. Supp.*, 901, is an authority precisely in point on that question, and its insufficiency is practically conceded on this appeal. Upon the return day of the summons no one appeared on the part of defendant, and judgment was taken against him by default in plaintiff's favor for \$47.25, debt and costs. The defendant subsequently appealed to the county court of Oswego county, where the judgment of the justice was affirmed, and from such judgment this appeal is brought.

There is no statute giving a justice of the peace authority to enter judgment against a defendant on default unless the summons has been personally served upon him, except the provisions of section 2918 of the Code. By that section it is provided that when a defendant does not appear and the summons has not been personally served upon him, nevertheless judgment may be rendered against him if his property "has been duly attached by virtue of a warrant that has not been vacated." The section further provides that the judgment so rendered is only presumptive evidence of indebtedness, and that it can be satisfied by execution only against the property so attached.

In the case at bar, therefore, the justice had no jurisdiction to enter judgment against defendant, unless his property had been "duly attached by virtue of a warrant that had not been vacated." It is true that the warrant which the justice assumed to issue had never been vacated,

but can it be said that defendant's property had ever been "duly attached" by virtue of it? I think not. The attachment was entirely unauthorized. It ought never to have been issued, and the property of the defendant ought never to have been taken upon it. By section 2,916 the justice is given authority, "on his own motion," to vacate the attachment on the return of the summons "if he deems the papers on which it was granted insufficient to authorize it." Reading all these provisions together, I think it is the duty of a justice, on the return of a summons that has not been personally served, to enter judgment by default only when the record shows an attachment lawfully issued and regularly executed. For the want of a personal service of summons he has never acquired jurisdiction over the person of defendant, and for the want of an attachment, lawfully issued, the proceeding against the property of defendant is utterly unauthorized. Not even as against the property attached has he acquired any jurisdiction, for clearly, he cannot do so by issuing a process he had no authority to issue, nor by omitting to vacate such a process after having assumed to issue it. On the return of the summons, therefore, the justice should have treated the case as if no attachment had ever been issued, and his entry of judgment by default against defendant was therefore unauthorized.

The respondent's counsel claims that the defendant does not dispute the validity of the debt; that the errors alleged are purely technical; and that, therefore, under section 3,063 of the Code, the county court correctly affirmed the judgment. The difficulty with that argument is that the error complained of is not by any means a technical one. The question presented by this appeal is whether a justice of the peace may enter judgment against a party on default without first having, by some lawful process, acquired jurisdiction to do so. In the course of this action, the defendant has not, as yet, been

Jorgensen v. Low Dutch Reformed Church.

called upon to question the validity of the plaintiff's claim. When he shall have been lawfully summoned into court, or when his property shall have been lawfully subjected to the judgment of the court, by the service of a lawful process against it, it may be that he will successfully defend against the plaintiff's claim; and, until he has been called upon to make his defense, it can hardly be said that "justice has been done" by rendering any judgment whatever against him. It does not appear, therefore, that the amount of the judgment, even, is correct, and it does appear that the justice had no jurisdiction to render any judgment whatever against defendant. To such a case section 3,063 does not apply, and the judgment of the justice should have been reversed. The judgment of the county court and of the justice should be reversed, with costs.

MERWIN, J., concurred in the result. HARDIN, P. J., not voting.

JORGENSEN v. THE MINISTER, ELDERS, AND
DEACONS OF THE REFORMED LOW CHURCH
OF HARLEM, ETC., *et al.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
OCTOBER, 1893.

§§ 382, 383.

Limitations to action for personal injuries—nuisance.

An action to recover damages for personal injuries caused by the maintenance by defendants of a nuisance, is not an action to recover damages for personal injuries resulting from negligence, and therefore the time limited for its commencement is six, and not three years from the time the cause of action accrued.

(Decided October 18, 1893).

Jorgenson v. Low Dutch Reformed Church.

Trial of demurrer to defense consisting of new matter set up in the answer.

This action was brought to recover for loss to plaintiff of the services of his wife resulting from personal injuries received by falling down a cellar-way, opening into the street and alleged in complaint to have been a public nuisance.

The ninth paragraph of the answer served by the defendants, the Minister, Elders, and Deacons of the reformed Low Dutch Church of Harlem, etc., is as follows :

"Ninth, and for a further and separate defense defendant, alleges upon information and belief that the cause of action set forth in the complaint herein did not accrue within three years next preceding the commencement of this action."

To this defense, plaintiff demurred on the ground that it was insufficient.

William B. Tullis, for plaintiff and demurrer.

Robert A. Johnston, for defendants, Ministers, Elders, Deacons, etc., opposed.

GIEGERICH, J.—The question raised by the defendant in opposition to the demurrer herein is whether any distinction exists between an action for personal injuries caused by the maintenance of a nuisance and an action for personal injuries resulting from negligence, with reference to the Statute of Limitations.

The complaint clearly sets forth the cause of action for damages by reason of the maintenance of a nuisance, and unless it can be said that the above distinction does not exist, the demurrer must be sustained.

Section 382, subdivision 3, of the Code, prescribes that the time within which an action for personal injuries shall be brought, is six years, "except in a case where a different period is expressly prescribed in this chapter. The only express exception relative to an action for per-

Arrow Steamship Company v. Bennett.

sonal injuries is found in section 383, subdivision 5, which relates to personal injuries resulting from negligence, in which case the limitation is three years.

I can find no justification for holding that this action can be brought within the exception expressed in the above section. The question of negligence is not in this case, an unlawful maintenance of the structure causing the injury, being the sole gravamen of the action. Even under the most liberal construction of section 383, it cannot be said to comprise an action of this character, and a construction the reverse of liberal should be adopted in reading that section in connection with the former provision, in derogation of which it stands.

The demurrer is therefore sustained, with costs.

ARROW STEAMSHIP CO. v. BENNETT.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, OCTOBER, 1893.

§§ 481, 531, 1237.

Judgment roll—what papers should be contained in, where judgment is entered on demurrer—bill of particulars.

Where a demurrer to a complaint is over-ruled and interlocutory judgment entered in favor of the plaintiff, a bill of particulars served by the plaintiff is not a proper part of the judgment roll and a motion that it be annexed thereto should be denied.

A bill of particulars should not be made a part of a judgment roll unless it involves the merits or necessarily affects the judgment.

While a bill of particulars has been spoken of as an amplification of the pleading to which it relates and must be considered as a part thereof, it is strictly speaking no part of the pleading to which

Arrow Steamship Company v. Bennett.

refers ; its object is to apprise a party of the details of his opponent's claim and to limit a party to the items there stated, not to state facts to support the claims.

(Decided October 18, 1893.)

Motion by the defendant that the plaintiff be required to include in the judgment roll made up on the entry of interlocutory judgment herein, a bill of particulars served by it.

On May 10, 1893, interlocutory judgment was entered herein over-ruling a demurrer interposed by defendant to the complaint, but granting defendant leave to answer over on paying costs. The defendant served notice of appeal from this judgment on May 26, 1893, and on the 31st day of the same month he served upon plaintiff's attorneys three copies of the printed papers on appeal, and they signed a stipulation to the effect that such printed papers were correct and waiving certification thereof.

The cause was noticed for the June general term and again for the October general term, and placed upon the calendar for the last named term.

Subsequently, on September 25th, the plaintiff's attorneys asserting that a bill of particulars served by them had been referred to on the argument and had been by them inadvertently omitted from the judgment roll obtained and served an order to show cause upon which this motion was made.

David McClure (Turner, McClure & Rolston, attorneys), for plaintiff and motion.

A bill of particulars is an amplification of the pleading to which it is attached and must be considered as a part thereof. *Bowman v. Earl*, 3 *Duer*, 691 ; *Starkweather v. Kittle*, 17 *Wend.* 20. . . . *Higgenbotham v. Green*, 25 *Hun*, 261.

Arrow Steamship Company v. Bennett.

John Townshend, for defendant, opposed.

Ordinarily a bill of particulars forms no part of the record. *Kress v. Seligman*, 8 *Barb.*, 439; *Orvis v. Dana*, 1 *Abb. N. C.*, 268; *S. C. 6 Daly*, 434. The general term, first department, denied a motion to include a bill of particulars in a judgment roll, saying a bill of particulars forms no part of the judgment roll and should not be annexed except for reasons special and satisfactory. *Putney v. Tyng*, 1 *St. Rep.*, 760 . . . Such a thing as an answer, reply or demurrer to a bill of particulars is almost unknown. *Kress v. Seligman*, 8 *Barb.*, 439; *Orvis v. Dana*, 1 *Abb., N. C.*, 287; *S. C. 6 Daly*, 451. . . . A bill of particulars is never used to supplement a material allegation of a pleading. *Orvis v. Dana*, *supra*. . . . The office of a bill of particulars is not to state the grounds upon which the plaintiff claims to recover, but only to point out the items and particulars of his claim. *Seaman v. Low*, 4 *Borw.* 337. A bill of particulars does not change the nature of the action. It is not a declaration nor is it a novel assignment.

INGRAHAM, J.—By section 481 of the Code it is provided that the complaint must contain the title of the action, the name of the Court in which it is to be brought, the name of the county which the plaintiff designates as the place of the trial of the action and a plain and concise statement of the facts constituting such cause of action and a demand for the judgment to which the plaintiff supposes himself to be entitled, and it is to this complaint that the defendant demurs.

If the complaint is not definite, the defendant has the right to move to make it more definite and certain, but when the complaint is finally settled, the right of the plaintiff to recover must depend upon the facts therein alleged.

Arrow Steamship Company v. Bennett.

The defendant in this case demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action and it is this demurrer that was overruled, and from the interlocutory judgment overruling the demurrer the defendant has appealed.

The only provision of the Code relating to a bill of particulars is contained in section 531, which provides that the Court may in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party. It is true that the bill of particulars has been spoken of as an amplification of the pleading to which it is attached, and must be construed as a part thereof; but strictly speaking a bill of particulars is no part of the pleading to which it refers. The object of a bill of particulars is to apprise a party of the details of his opponent's claim, and to limit a party to the items here stated, not to state facts to support the claim. The facts that would entitle a party to judgment must be stated in the pleading, the details of the claim are to be stated in the bill of particulars.

There is nothing in the Code that expressly provides that the bill of particulars must be made part of the judgment roll. It is only where a bill of particulars involves the merits or necessarily affects the judgment that it should be made part of the roll (§ 1237), and where the sole question determined by the judgment is that the pleading demurred to does or does not state facts sufficient to constitute a cause of action, the addition of any other paper except the pleadings, the demurrer and the judgment would seem to be unnecessary.

I think, therefore, the motion should be denied, with \$10 costs to abide the event.

Lafrentz v. Mass.

LAFRENTZ, AN INFANT BY LAFRENTZ, GUARDIAN, *ad litem v. MASS.*

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM,
OCTOBER, 1893.

§§ 559, 3268, 3273.

Security for costs when required although undertaking given to secure order of arrest.

The costs secured by an undertaking given upon obtaining an order of arrest are not the costs of the action, but those which may be awarded to the defendant as accruing from or necessitated by his arrest, and, therefore, the fact that an infant plaintiff has given such an undertaking, does not relieve him from the necessity of giving security for the costs of the action.

Sutorius v. North (20 *N. Y. Civ. Pro.*, 162), *Sperry v. Hellman* (20 *Id.* 218), followed.

(Decided October 12, 1893).

Motion by plaintiff for the vacation of an order requiring him to give security for costs of the action.

The plaintiff at the commencement of this action obtained an order for the arrest of the defendant and gave the undertaking required by section 559 of the Code of Civil Procedure. The defendant subsequently obtained an order requiring plaintiff to file an undertaking or make a deposit as security for costs on the ground that the plaintiff is an infant suing by guardian, *ad litem*.

The plaintiff thereupon made this motion.

Robert J. Robeson, for plaintiff and motion.

Joseph Stiner (*Alfred & Charles Steckler*, Attorneys), for defendant, opposed.

T. New Manufacturing Co. v. Galway.

GIEGERICH, J.—A comparison of section 559 of the Code, with section 3273 shows the distinction between an undertaking as security for costs under the latter section and the undertaking upon arrest under the former.

The undertaking upon which plaintiff relies for the purposes of this motion is in the usual form and follows the words of section 559, viz.; "All costs which may be awarded to the defendant * * * * by reason of the order of arrest," while section 3273 requires security for "all costs which may be awarded to him in the action.

The costs for which security has already been given herein are not the costs of the action but only the costs which may be awarded to the defendant as accruing from or necessitated by his arrest (*Sutorius v. North*, 20 *Civ. Pro. R.* 162). See also upon the distinction above noted *Sperry v. Hellman* (20 *Civ. Pro. R.*, 218).

Motion denied, with \$10 costs. Plaintiff's guardian *ad litem* to comply within ten days with the terms of the order of September 18th, directing security for costs to be given.

T. NEW MANUFACTURING CO. v. GALWAY.

SUPREME COURT, FIRST DEPARTMENT NEW YORK COUNTY,
SPECIAL TERM, OCTOBER, 1893.

§ 3253.

Extra allowance—basis on which computed in creditor's action to set aside conveyance.

In a judgment creditor's action to set aside a conveyance of land on the ground that it was made to hinder, delay and defraud creditors an extra allowance should be computed upon the amount due

T. New Manufacturing Co. v. Galway.

the plaintiff upon his judgment and not upon the value of the land, and this is so whether the plaintiff or the defendant succeeds, *Potter v. Farrington* (24 *Hun* 551,) followed.

Where in such an action two defendants appear by the same attorney, they upon succeeding can have but one extra allowance.

(Decided October 16, 1893.)

Motion by defendants for an extra allowance.

The opinion states the facts.

Royal S. Crane, for defendants and motion.

N. Loeser, for plaintiff, opposed.

LAWRENCE, J.—As the two defendants appeared by the same attorney but one allowance can be granted.

It has been distinctly held, that in an action brought by a judgment creditor to set aside a conveyance of land, made by the defendant on the ground that it was made with intent to hinder, delay and defraud his creditors, in which action the plaintiff succeeds, an extra allowance must be based upon the amount due to the plaintiff upon his judgment, and not upon the value of the land (*Pottery, Farrington*, 24 *Hun*, 551).

The same rule must apply, where the defendant succeeds as in this case, inasmuch as the suit only involves the value of the property, to the extent of the alleged lien.

The amount of the judgment in this case, the lien of which is sought to be established by this action, is the sum of \$464.18, and upon that amount an allowance at the rate of five per cent. to wit, the sum of \$23.20, will be granted to the defendants. Findings signed.

PIEPGRAS v. EDMUNDS AND ANOTHER.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
OCTOBER, 1893.

§ 1366, *et seq.*

Execution—when irregular, but not void—when protects party issuing.

Where a judgment in an action to recover possession of real property awards a portion of the real property therein to the plaintiff and another part to one of the defendants, and thereafter is modified on appeal by excluding therefrom certain easements, and an execution issued upon such judgment for the delivery of the possession of the property did not sufficiently conform to the judgment, in that it did not contain a recital of the limitations respecting the easements—*Held*, that the execution was not a void process; that it sufficiently conformed to the judgment upon which it was issued.

Where in such a case a motion was made to vacate and set aside the execution and that motion was denied and the execution was amended *nunc pro tunc* as of the time issuing to make it conform to the judgment as modified—*Held*, that the defendant was protected for all acts done under and in conformity with the execution.

A void writ or process furnishes no justification to a party for an act done under it and he is liable therefor at any time, and it is not necessary that it should be set aside before bringing an action.

If a writ or process is irregular or erroneous, only, and not absolutely void, no action lies for acts done under it, until it is set aside; but when it is set aside, it ceases to be a protection for such acts. But if the process was irregular where the Court has jurisdiction the party may justify what has been done under it after it has been set aside for error in the judgment or proceedings.

(Decided October 18, 1893.)

Demurrer by defendants to complaint in action to recover damages resulting from acts done by the sheriff

Piepgas v. Edmunds.

under an irregular execution, on the ground that such complaint does not state facts sufficient to constitute a cause of action.

The facts are stated in the opinion.

T. C. Byrnes, for defendant Edmunds and demurrer.

John Hunter, Jr., defendant in person, for demurrer.

George A. Black, for plaintiff, opposed.

GILDERSLERVE, J.—The cause of action set forth in the complaint, briefly stated, is as follows: One Elizabeth D. De Lancy, by her attorney, the defendant Edmunds, brought suit in ejectment to recover possession of three-fourths part from Piepgas, the plaintiff herein, of certain lands, below high water mark, at City Island, impleading one John Hunter, the owner of the remaining one-fourth part of said premises, whose attorney was the defendant herein, John Hunter, Jr., and who, in his answer, demanded judgment for the delivery to him of the possession of the said one-fourth part. The said Piepgas, in his answer in said action, "admitted that he was seized and in possession as owner of said premises, but denied that he unlawfully withheld possession." The action was tried in the Supreme Court, Westchester County, and judgment was given De Lancy and Hunter, respectively; for the recovery of the immediate possession of said premises from said Piepgas, and for execution therefor. Piepgas appealed from both of these judgments to the General Term, where they were both affirmed. On appeal to the Court of Appeals, the judgment was modified by inserting therein "the proviso and reservations contained in the patent

Piepgras v. Edmunds.

of Palmer, and, as so modified, affirmed." This Palmer patent, as appears from the complaint, granted certain easements, which, by the judgment of the Court of Appeals, were not taken from said Piepgras. The complaint also sets forth a certain judgment, entered, on the remittitur of the Court of Appeals, in the Supreme Court, by De Lancey and Hunter, and a certain execution issued on said judgment by the defendants herein, as attorney for De Lancey and Hunter. The complaint further alleges that plaintiff was the owner of the upland adjacent to the premises under water, and used the same as a shipyard, and had erected thereon a large and valuable building, plant and equipment for shipbuilding, and used the same in connection with a dock and several marine railways, all built by plaintiff or his grantors, and extending from the plaintiff's upland to the channel and navigable waters of Long Island Sound over the said land under water, which dock and marine railways were essential to the use and enjoyment of said shipyard and to plaintiff in his business, and were lawfully there; from all of which marine railways and dock plaintiff was excluded by the Sheriff by virtue of the execution issued as aforesaid, and by virtue of the delivery thereof to the said De Lancey and Hunter by said Sheriff, and plaintiff was thereby prevented from carrying on his said business of ship building, and put to great loss, etc. The complaint also alleges knowledge of all these facts by defendants, and that plaintiff had not been deprived of these rights and uses by the judgment of the Court of Appeals, but was unlawfully deprived of them through the improper wording of the execution issued by the defendants herein upon the improperly worded judgment of the Supreme Court, entered on the remittitur of the Court of Appeals. The plaintiff applied to the Court to modify the judgment of the Supreme Court, entered on the remittitur of the Court of Appeals, by making it conform more closely with the

Piepgras v. Edmunds.

decision of the Court of Appeals, which motion was granted, and, at the same time, the execution was modified, *nunc pro tunc*, to make it conform to the modified judgment. And the complaint alleges that, by reason of all these aforesaid facts, occasioned by the wrongful acts of the defendants, plaintiff has been put to great loss, expense, trouble, etc.; and finally the complaint demands judgment for the sum of \$15,000 and costs. The judgment of the Supreme Court, entered on the remittitur of the Court of Appeals, the execution issued thereon, and the judgment as afterwards modified by the Court at Special Term, on plaintiff's motion, are all set forth in the complaint in full.

The execution does not sufficiently conform to the judgment upon which it was issued, inasmuch as it does not contain a recital of the limitation of the easements set forth in the judgment, but directs the delivery of the possession of the premises, after reciting, among other things, that the Court of Appeals had "modified" the judgment of the General Term. However, it was not a void process. It was sufficiently in conformity with the judgment, upon which it was issued, to prevent its being void. The judgment itself was a judgment of the Supreme Court, duly signed by Mr. Justice Dykman, and duly entered. It was not a void judgment, and the defendants were protected for all acts done under and in conformity with it, inasmuch as it has never been vacated, but only modified, and it is still, so far as the complaint shows, in force.

The execution was not a void process; but simply insufficient, erroneous or irregular. If an attorney causes a void or irregular or erroneous process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, he is liable for the damage thereby occasioned. In the case of void process, the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action. Process, how-

ever, that a Court has general jurisdiction to award, as in the case at bar, but which is irregular or erroneous, must be regularly vacated or annulled by an order of the Court before an action can be maintained for damages occasioned by its enforcement (*Day v. Bach*, 87 *N. Y.*, 56). In such cases, the process is considered the act of the party and not that of the Court, and he is therefore, made liable for the consequences of his act (*Fisher v. Langbein*, 103 *N. Y.*, 89). In the case at bar the process was not vacated, but simply amended *nunc pro tunc*, to more nearly conform to the judgment of the Court of Appeals and to the judgment of the Supreme Court, as amended, upon which it was issued. The execution was erroneous, but not void, and it has not been vacated, but is still in force. It, therefore, protects the defendants for acts done under it. If the Sheriff exceeded his instructions under the execution, he, and not the defendants, is liable. The law may be stated as follows: First, that a void writ or process furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be set aside before bringing the action. Second, if the writ is irregular or erroneous only, and not absolutely void, no action lies until it has been set aside; but when set aside, it ceases to be a protection for acts done under it while in force. Third, if the process was regularly issued, in a case where the Court had jurisdiction, the party may justify what has been done under it, after it has been set aside for error in the judgment or proceeding (*Day v. Bach*, 87 *N. Y.*, 61). In this case, as we have said, the process was erroneous, but not void; and it has never been set aside, but is still in force, as amended *nunc pro tunc*. I am, therefore, of opinion that the defendants are protected for the acts done under it, and that the complaint is demurrable.

The question whether the process was void may be said to be *res adjudicata*, inasmuch as the Supreme Court,

Logan v. The McCall Publishing Co.

at Special Term, as appears from the complaint, has denied plaintiff's motion to vacate and set aside the execution for irregularity or erroneousness, has held that it was not a void process, but has amended it, *nunc pro tunc* as of the time of issuing, to make it conform more expressly to the decision of the Court of Appeals and to the judgment, as amended, of the Supreme Court, upon which it was issued.

For the reasons above stated, the demurrer must be sustained, with costs.

LOGAN, APPELLANT, v. THE MCCALL PUBLISHING
CO., RESPONDENT.

N. Y. COURT OF APPEALS, DECEMBER, 1893.

§§ 1810, 1812, 2435 *et seq.*, 2463.

Supplementary proceedings — when maintainable against foreign corporation — receiver.

Proceedings supplementary to execution may be maintained against a foreign corporation not doing business in this State, nor having any business or fiscal agency therein or agency for the transfer of its stock.

Stevens v. Page (*Ante* p. 191), overruled.

(*Decided December 19, 1893.*)

Appeal from an order of the General Term of the Court of Common Pleas for the City and County of New York, affirming an order of Mr. Justice Giegerich denying a

motion to extend the receivership of a receiver appointed in supplementary proceedings to the judgment recovered by the plaintiff in this case.

The appellant is a judgment creditor of the McCall Publishing Company, having recovered judgment upon the personal service of the summons upon the respondent. An order had been made by one of the Judges of the City Court of New York on the 11th day of February, 1893, which was long prior to the recovery of the judgment upon which this proceeding is based, appointing George W. Stephens receiver of the property of the McCall Publishing Company in proceedings supplementary to execution against that company.

The present proceeding was commenced on October 4th, 1893, by the granting of an order for the examination of the judgment debtor, which was served on George H. Bladworth, one of the directors and the treasurer of that company. The said Bladworth duly appeared before said Justice and was examined. It was set up in the affidavit on which the order of examination was issued that the judgment debtor, at the time of the issuing of the execution herein and ever since, was a foreign corporation doing no business within this State and having no business agency or a fiscal agency or an agency for the transfer of its stock therein. The fact was also admitted by its treasurer on his examination, and it had also appeared in the original proceeding in the City Court when the receiver was appointed.

A motion having been made to extend the receivership under the order of the City Court to the judgment recovered in the Court of Common Pleas, the motion was denied upon the express ground, as stated in the order, "that neither this court nor any justice therein has power to appoint a receiver of the defendant in proceedings supplementary to execution taken against it or to extend

Logan v. The McCall Publishing Co.

any receivership heretofore ordered by any other court or justice."

From this order the plaintiff appealed to the General Term of the Court of Common Pleas, where the order was affirmed, and from such order of affirmance the present appeal was taken.

George W. Stephens, for judgment creditor, appellant.

The Code, by its express terms, permits the maintaining of proceedings supplementary to execution in a case like this.

The only limitation upon the right to maintain proceedings supplementary to execution against any class of debtors is contained in section 2463 of the Code.

The plain inference is, that where the corporation is one not specified in section 1812, or where the action or special proceeding is brought by or against the people of the State, the proceedings may be maintained. If the section does not mean this it is utterly meaningless. It cannot require any citation of authorities to sustain the appellant's position. The maxim *expressio unius est exclusio alterius* so plainly applies that further discussion of this proposition must be needless.

We have, therefore, by the terms of the statute two exceptions to the general rule that these proceedings may not be maintained against a corporation: (1) They may be maintained against a foreign corporation provided it is one not enumerated in section 1812. (2) They may also be maintained where the action or special proceeding is brought by or against the people of the State. Manifestly, if a party can show that the case is brought within either of these exceptions the proceedings may be maintained. The cases enumerated in section 1812, and in which supplementary proceedings cannot be brought

against a foreign corporation are: (1) Where it does business within the State, or (2) where it has within the State a business agency or a fiscal agency, or (3) an agency for the transfer of its stock. * * * As by the terms of section 2463, proceedings supplementary to execution are only prohibited where the foreign corporation is one enumerated by section 1812, it must follow that if the judgment debtor is a foreign corporation and neither does business within the State nor has within the State a business agency, or a fiscal agency, or an agency for the transfer of its stock, it is not specified in Section 1812, and proceedings supplementary to execution can, therefore, be maintained against it. . . .

Unless a receiver can be appointed in supplementary proceedings, none can be appointed in the present instance in any other way. *Code Civ. Pro.*, § 1810, 1812.

No appearance for respondent.

ANDREWS, CH. J.—The order of the Special Term, which was affirmed by the General Term, denied the motion to extend the receivership under an appointment in a prior action, to the judgment of the plaintiff in the action, on the ground that the provisions of the Code do not authorize supplementary proceedings against a foreign corporation in any case. It was held under the former Code that the provisions of that Code relating to supplementary proceedings applied to natural persons only (*Hinds v. C. & N. F. R. R. Co.*, 10 *How.* 487; *Sherwood v. Buffalo, etc., R. R. Co.*, 12 *id.* 136.) These were cases of supplementary proceedings under judgments against domestic corporations, and it was decided that remedies against such corporations, in case of insolvency, must be had under the provisions of the Revised Statutes. In this case it appears that the defendant is a foreign

Logan v. The McCall Publishing Co.

corporation, not doing business in this state nor having any business or fiscal agency therein, or agency for the transfer of its stock, and by section 1812 of the Code of Civil Procedure such a corporation is excluded from the operation of section 1810, providing for the appointment of receivers of the property of corporations.

Section 2465 is a new provision and seems, by necessary implication, to authorize supplementary proceedings in a case like this. It declares: "This article does not apply where the judgment debtor is a corporation created by or under the laws of this State, or a foreign corporation specified in section 1812 of this Act, except in those actions or special proceedings brought by or against the people of the State." The defendant is not one of the foreign corporations specified in section 1812. The article in which section 2463 is found is the one regulating proceedings supplementary to execution. Section 2435 authorizes supplementary proceedings against a "judgment debtor," making no distinction between a natural person and a corporation. Section 2458 requires that the execution, in case the judgment debtor is not, when the execution is issued, a resident of the State, must have been issued to the sheriff of the county where the judgment roll is filed, unless the execution was issued out of a court other than that in which the judgment was rendered, and in that case to the sheriff of the county where the transcript of the judgment is filed.

Section 2452 provides how an order for the examination may be served upon a corporation. The only limitation upon the right to take proceedings supplementary to execution against any class of debtors is contained in section 2463, and this plainly does not embrace a foreign corporation doing no business and having no agency in this State; and this was the situation of the defendant.

The case presented to the Special Term showed a

Strauss v. Vogt.

compliance with all the conditions precedent to the maintenance of supplementary proceedings. The plaintiff had a valid judgment upon which execution had been issued to the proper county and returned unsatisfied. The defendant was a non-resident. It was not a corporation specified in section 1812. The plain implication from section 2463 rendered it subject to proceedings supplementary to execution. The policy of the State does not preclude the creditor of such a corporation from obtaining a preference upon assets here.

We think the orders of the Special and General Terms should be reversed, and that the matter should be remitted to the Special Term for further proceedings.

All concurred.

STRAUSS v. VOGT.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
MAY, 1893.

§ 682.

Attachment—when motions to vacate cannot be made both by the defendant and his assignee.

Where the defendant in an attachment moved to vacate it—1st, on the original papers, and, 2d, on counter affidavits—and both motions were denied, and subsequently one to whom he had, after the attachment but before the making of his motions, made an assignment for the benefit of his creditors, moved to vacate the attachment—*Held*, that the adjudications made bound the assignee on account of the privity between the parties, and the motion made by him to vacate the attachment should be denied upon the ground that he had under the circumstances no right to a rehearing without leave of the court first had and obtained.

Decided May 26, 1893.)

Motion by Edward E. Thomas, assignee of the defendant for the benefit of his creditors, to vacate an attachment levied upon property of the defendant.

Strauss v. Vogt.

The plaintiff on March 27, 1893, obtained an attachment against the defendant's property and caused it to be levied thereon. Thereafter the defendant made an assignment for the benefit of his creditors to Edward E. Thomas, which was dated March 28, 1893. The defendant subsequently moved to vacate the attachment on the papers on which it was granted. His motion was denied and he moved again for the same relief on affidavits. This motion also was denied and the defendant appealed. Thereafter this motion was made.

Edmund A. Thomson, for assignee and motion.

William J. Townsend (Hess, Townsend & McClelland, Attorneys), for plaintiff, opposed.

MCADAM, J.—Under section 682 of the Code, a defendant or his assignee may lawfully move to vacate an attachment against property. It is a right belonging to either, but does not necessarily extend to both. The defendant moved, 1st, on the original papers; 2d, on counter affidavits. Both motions were denied, and an appeal is now pending from the decision last made, on which the assignee may be heard at General Term.

These decisions, until reversed, preclude the assignee from obtaining a rehearing of the matters adjudicated; he merely succeeded to the rights of the assignor, subject to the litigation then pending. The adjudications made bind the assignee on account of the privity between the parties (see *Wells on Res Adjudicata*, § 32; *Luddington's Petn.*, 5 *Abb. N. C.*, 307, and by analogy, see rule as to privity, bailor and bailee, *Wells, supra*, § 67).

Suppose the present application should be denied upon the merits, what is to prevent successive assignees from making similar motions founded on their newly ac-

Barnes v. Levy.

quired interest in the property? The line must be drawn somewhere or motions of this kind may become interminable.

The motion by the assignee will therefore be denied, and upon the ground that he has under the circumstances no right to a rehearing without leave of the court first had and obtained. No costs.

BARNES v. LEVY.

CITY COURT OF NEW YORK, SPECIAL TERM, APRIL, 1893.

§§ 2432, *et seq.*

Supplementary proceedings—production of books.

The production of books in proceedings supplementary to execution must be enforced by subpoena *duces tecum*, as in an action, and when the examination is concluded or adjourned the books may be taken away by the person examined and returned whenever and as often as they are required for use on the examination, but there is no power to compel the witness to leave the books with the referee for the inspection or scrutiny of the creditors.

(Decided April 11, 1893.)

Motion to punish the judgment debtor for contempt in not obeying an order of the referee, before whom proceedings supplementary to execution were pending, directing him to leave his books of account with the referee for the inspection of the judgment creditor.

Upon his examination in proceedings supplementary to execution the judgment debtor produced certain books and the referee before whom the proceeding was pending directed him, upon motion of the judgment creditor's attorney, to leave them with the referee until the conclusion of the examination. This he declined to do and this motion was thereupon made.

Barnes v. Levy.

Abraham Gruber for judgment creditor and motion.

Blumenstiel & Hirsch for judgment debtor, opposed.

EHRLICH, C. J. — The statute authorizing supplementary proceedings has not abolished the old remedy by creditors' bill *Hart v. Albright* (28 *Abb. N. C.*, 74), in respect to which the old chancery powers remain.

In supplementary proceedings the powers conferred are statutory only, and the production of books must be enforced by subpoena *duces tecum*, as in an action (1 *Civ. Pro.*, 193) when the examination is concluded or adjourned for the day the books may be taken away by the person examined and returned wherever and as often as they are required for use on the examination, but there is no power to compel the witness to leave the books with the referee for the inspection or scrutiny of creditors.

The chancery rules referred to by the referee were in aid of the inherent powers of the old Court of Chancery and do not apply to the limited jurisdiction conferred by the statute in reference to supplementary proceedings.*

Motion to punish for contempt in declining to obey order of referee denied, without costs.

* The Chancery Rules here mentioned are Rules 191 and 103 and read as follows:

RULE 103.—Where, by any decree or order of the court, books, papers or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers or writings are to be produced, and when and for how long they are to be left in his office; or, in case he shall not deem it necessary that they should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

RULE 191.—The debtor against whom a creditor's bill is filed shall not be subjected to the expense of putting in an answer thereto in the

Barnes v. Levy.

usual manner if he shall cause his appearance to be entered within twenty days after the return day of the subpoena, and shall, within twenty days after service of a copy of the bill and notice of the order to answer, deliver to the complainant or his solicitor a written consent that an order may be entered taking the bill as confessed, and for the appointment of a receiver and for a reference to take the examination of the defendant, in conformity to this rule. Upon presenting such written consent to the court, the complainant may have a special order, founded thereon, directing the bill to be taken as confessed against the debtor; and referring it to such master as the court may designate in such order, to appoint a receiver, with the usual powers, and to take from him the requisite security. The order shall also direct the defendant to assign, transfer and deliver over to the receiver on oath, under the direction of the master, all his property, equitable interests, things in action and effect; and that he appear before the master, from time to time, and produce such books and papers and submit to such examination as the master shall direct in relation to any matter which he might have been legally required to disclose if he had answered the bill in the usual manner. The expense of taking down such examination, by the master, shall be paid by the complainant, in the first instance, and may be taxed and allowed to the latter as a part of his necessary costs in the suit. The complainant shall also be at liberty to examine witnesses before the master as to the property of the defendant, or as to any other matter charged in the bill and not admitted by the defendant on such examination. And the complainant shall cause a written or printed copy of this rule to be served on the defendant at the time of the service of the subpoena, with a notice to the defendant that an entry of his appearance and an answer on oath is required; or such defendant shall not be answerable to the complainant for the costs of the proceedings to compel an appearance and answer.

Vogel v. Schlueter.

VOGEL, APPELLANT, v. SCHLUETER AND ANOTHER,
RESPONDENTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM,
DECEMBER, 1893.

§§ 3070, 3072.

Costs—where new trial had on appeal from justice's court.

An appellant prevailing on a new trial had in a county court on appeal from a justice's court is entitled to costs where there has not been an offer of judgment, if the verdict, report or decision upon the appeal is more favorable to him by the sum of ten dollars than the verdict or decision in the court below.

Vanderwerken v. Brown (38 Hun, 234) followed.
(Decided December, 1893.)

Appeal from order of the County Court of Kings County vacating and setting aside a taxation of costs made in favor of the plaintiff.

Upon the taxation of costs before the clerk he filed the following opinion:—

By the clerk (WILLIAM J. LYNCH, Deputy):—I regard the decision in case of Munson v. Curtis, 43 Hun, 214, as conclusive, on the question of costs; it is directly in point and favors the plaintiff's contention. The case of McKuskie v. Hendrickson, 128 N. Y., 555, is distinguishable from the present case and also the Munson case, in that, there was an offer to allow judgment to be taken in that case, whereas no such offer was made in this or Munson case. I have therefore allowed plaintiff costs and given defendants an exception in order that my ruling may be reviewed if desired.

Herman Vogel, plaintiff, appellant in person.

This action originated in a Justice's Court, and the complexion of the action is in no way changed by the

new trial being had in the County Court. To all intents and purposes, it is still an action in the Justice's Court, especially in so far as the question of costs is concerned, (See *Code*, § 3073.) Were it otherwise, the party recovering costs would be entitled to the full allowance under section 3251 instead of the restricted allowance provided for by section 3073. It is the same in principle as the case of a party recovering a judgment in a Justice's Court. In such a case, the proceedings looking to the enforcement of the judgment must be had and taken in the County Court. By the filing of a transcript of a Justice's judgment in the County Clerk's office, it is deemed a judgment of the County Court, and must be enforced accordingly (§ 3017.) But the Court of Appeals has held, that this has not the effect of making such a judgment, a judgment of the County Court, for all intents and purposes, but simply for the purpose of enforcement. See *Dieffenbach v. Roch.*, 112 *N. Y.*, 621.

Hence it is that section 3071, which provides that after the expiration of ten days from the time of the filing of the Justice's return, the action is deemed an action at issue in the Appellate Court, and all the proceedings therein, including the entry, enforcement and review of the judgment, are the same as if the action had been commenced in the Appellate Court, except as otherwise specially prescribed in this chapter. . . .

In addition to this, the following section (3072) provides for the making of an offer "after the section is deemed at issue in the Appellate Court," and section 3070 significantly provides that "if neither party make an offer as provided herein, the party in whose favor the verdict, report or decision in the Appellate Court is given, shall be entitled to recover his costs on the appeal." Then follows section 3073, which provides for the special allowance of costs upon an appeal taken and pro-

Vogel v. Schlueter.

vided for in that article. Were it otherwise, the allowance of costs in such a case would not be thus restricted, but would be governed and regulated by the provisions prevailing in actions in courts of record and a full allowance granted under section 3257, subdivision 4. Section 3347, subdivision 13, of the Code provides that section 3228 applies only to actions in one of the courts specified in subdivision 4 of said section and subdivision 4 applies only to an action commenced in the Supreme Court, a Superior City Court, or a County Court so that costs under section 3228 does not apply to an action wherein an appeal is taken from a justice's court to the county court (See 45 *Hun*, 322.) The costs allowable in an action of this kind being regulated by section 3070 and no offer having been made by either party on the appeal, the plaintiff was entitled to costs having recovered a verdict :

 The decision of the clerk is sustained by authority; *Sheehan v. Butler*, 24 *Weekly Dig.*, 168. *Vanderwerken v. Brown*, 28 *Hun*, 234; *Balcom v. Terwilliger*, 42 *Hun*, 172; *Munson v. Curtis*, 43 *Id.*, 214; *Mock v. Saile*, 52 *Id.*, 198 *McKuskie v. Hendrickson*, 128 *N. Y.*, 555, relied upon by respondents, does not conflict with the foregoing authorities. An offer was made in that case, whereas no offer was made in this

Frank N. O'Brien, for defendant, respondent.

When the appeal is taken from the Justice's Court to the County Court and new trial demanded after the expiration of ten days from the filing of the justice's return, it became the same as an original action in the County Court. *Code Civ. Pro.*, § 3071. And the only way for

the appellant to secure costs on the appeal where his recovery was less than \$50 would be by making and serving a notice referred to in Code Civ. Pro., § 3072. *McKuskie v. Hendrickson*, 128 *N. Y.*, 555. Section 3070 relied upon by the appellant is only applicable for the making of an offer before the return is filed. It is claimed that sections 3071 and 3072 control. Plaintiff is not entitled to costs unless he recovers the sum of \$50 or more. Code Civ. Pro., § 3228, Sub. 4. If appellant claims that it is an action to recover a chattel, subdivision 2 of section 3228 of the Code limits the costs to the recovery where the recovery is less than \$50 and in this action the recovery was \$12.33, and at the most, if entitled to any costs, his limit must be \$12.33. The case of *McKuskie v. Hendrickson*, 128 *N. Y.*, 555, above referred to goes fully into the question and covers this case completely.

There was no offer made by the appellant before the filing of the justice's return as provided for in section 3070 of the Code nor after the return of the justice was filed did he make any offer under Section 3072 of the Code. And under the decision of the Court of Appeals above cited where the recovery is less than \$50 it is there held that such offer be made to secure costs.

DYKMAN, J.—This action was commenced in a court of a justice of the peace for the recovery of damages for the wrongful conversion of personal property belonging to the plaintiff.

Upon the trial before a jury a verdict was rendered in favor of the defendant, and from the judgment entered upon that verdict the plaintiff appealed to the County Court of Kings County where there was a new trial before a jury and the plaintiff recovered a verdict for \$12.33.

Neither party made any offer to allow judgment after the appeal to the County Court which was taken July 17, 1891.

Vogel v. Schluter.

Upon this state of facts the plaintiff claimed full costs which was allowed to him by the clerk.

Subsequently an application was made to the County Judge of Kings County to set aside the taxation of such costs, and the motion was granted. From that order the plaintiff has appealed to this court.

The question is under the control of this statutory provision: If an offer is not made and the verdict, report or decision upon the appeal is more favorable to the appellant by the sum of ten dollars, than the verdict or decision in the Court below . . . the appellant is entitled to recover costs upon the appeal." *Code of Civil Procedure*. § 3070.

This case fits the statute and the statute meets the case and controls it, and under its provisions the appellant was entitled to full costs.

The plaintiff was unjustly defeated in the lower court when he had a just claim, and he was compelled to appeal or suffer the loss of his claim and pay costs besides.

Upon the appeal he recovered a judgment more favorable to him by more than ten dollars.

While it may be true in strictness of language that the words "more favorable to the appellant," imply that the judgment in the lower court was in his favor, we yet think the provision has application also when he was defeated in the lower court, and obtains a more favorable judgment upon the appeal. Such was the view of the Court in the case of *Vanderwerken v. Brown*, 38 *Hun*, 234, and we concur in that view.

The order from which the appeal is taken should be reversed with ten dollars costs and disbursements, and the taxation of costs by the clerk in favor of the appellant should be affirmed.

PRATT, J., concurred.

MULLER v. THE MAYOR, ALDERMEN AND COMMONALITY OF THE CITY OF NEW YORK

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, OCTOBER, 1893.

§ 66.

Attorney's lien—may be assigned—effect of agreement for share of attorney's compensation.

Where upon a motion that the sheriff be required to pay to the attorneys for the plaintiff in an action, moneys collected upon an execution issued on a judgment entered therein, it appears that a portion of the moneys is claimed by a third person as assignee of the lien of the attorneys for the plaintiff, in part, the fact that such claimant is not a party to the action is of no importance upon the motion and his rights should be considered in view of the sheriff's responsibility.

In such a case where it appeared that there was a valid *prima facie* assignment of a part of the plaintiff's attorney's claim and lien, the moneys in the sheriff's hands should not be paid over to the plaintiff's attorneys without either first requiring an undertaking securing the claimant in the sum found due him, or deducting from the fund the amount of such claim and depositing it to the credit of an action brought by the claimant against the attorneys to establish his right thereto to be paid over to the person or persons who should be adjudged entitled thereto.

An agreement by the attorney for the plaintiff in an action to pay to one "L" one half of the profits which may be realized in said action, "this to be a lien on said money" is valid, *prima facie*, as an assignment of one half of the attorney's interest in moneys collected under an execution issued upon a judgment recovered in the

Muller v. The City of New York.

action, and "L" has a right to look to the fund for the satisfaction of his lien.

Chester v. Jumel (84 St. Rep., 214); Field v. Mayor (6 N. Y., 179) followed.

(Decided October 31, 1893).

Motion by the plaintiff that the sheriff be required to pay to his attorneys, moneys collected by him under an execution issued on the judgment recovered by the plaintiff against the defendant in this action.

This action was brought to recover damages for personal injuries. The plaintiff recovered judgment and issued execution thereon to the sheriff of the city and county of New York. The defendant thereupon paid the judgment to the sheriff, and the amount so received by him was demanded by the plaintiff's attorneys. He had in the meantime received notice from one W. L. S. Langerman that he claimed and was entitled to a part of the moneys collected on the judgment, and because of such notice refused to pay the moneys collected to the plaintiff's attorneys. They thereupon made this motion and upon the hearing thereof Mr. Langerman appeared by attorney and opposed the motion, other facts appear in the opinion.

McAdam & McAdam, for plaintiff and motion.

J. P. Berg, for W. L. S. Langerman, claimant, opposed.

GIEGERICH, J.—The question of the claimant's standing in Court, by reason of his not being a party to the action, is of no importance upon this motion. He claims as an assignee of the attorney's lien, in part, and seeks, by virtue of the alleged assignment, to avail himself of the right, which the Code gives to his assignor, to look to the proceeds of the judgment, in whosoever hands they may be, for the protection of his lien upon the cause of

Muller v. The City of New York.

action (Code of Civil Procedure, sec. 66). His rights under the alleged assignment are properly to be considered by the Court in view of the responsibility of the Sheriff, who refers to the notice of claim with which he has been served, as his defence to the moving party's demand. It is therefore necessary to consider the effect of the writing produced by the claimant as to whether or not it places him in the position of his assignor, the attorney, with an attorney's rights under section 66 of the Code. The only written assignment before me is that annexed to the claimant's affidavit and is in effect, that George H. McAdam one of the plaintiff's attorneys, agrees to pay to the claimant herein one-half of the profits which he may realize in this action, among others, "this to be a lien on said money." It is held that an attorney may make a valid assignment of his contingent interest in his client's cause of action (*Chester v. Jumel*, 24 N. Y. St. R., 214). An assignment for a valuable consideration of demands having at the time no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence (*Field v. Mayor*, 6 N. Y., 179). Therefore it is obvious that the written agreement submitted by the claimant upon this motion is valid, *prima facie*, as an assignment of one-half of George H. McAdam's interest in the fund in question, and that by virtue of the assignment, the claimant has a right to look to that fund for the satisfaction of his lien. My conclusion is that the Sheriff should be directed either to pay over to the plaintiff's attorneys the full amount collected upon the execution, on the plaintiff's furnishing an approved and sufficient undertaking to secure the claimant in the sum to the extent of which he may establish his claim in the action now pend-

* See NOTE ON THE EFFECT OF CERTAIN ASSIGNMENTS OF ATTORNEY'S LIEN, 22 N. Y. Civil Pro. 279.

Union Trust Company v. Schliep.

ing in this Court between Walter L. S. Langerman, plaintiff, and McAdam & McAdam, attorneys for the plaintiff herein, defendants, or at the option of the plaintiff that a direction should be made that said Sheriff pay over to said attorneys the amount so collected except the sum of \$800. Such last mentioned sum to be deposited by him in the Union Trust Company to the credit of the aforesaid action, and to be paid over to the person or persons who shall be adjudged to be entitled thereto. Should the undertaking, as above provided, be given, the sureties thereon shall justify on two days' notice. Settle order on one day's notice.

UNION TRUST COMPANY OF NEW YORK, As
SUBSTITUTED TRUSTEE, ETC., v. SCHLIEP, *et al.*

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY
SPECIAL TERM, NOVEMBER, 1892.

§ 723.

Judgment of foreclosure—amendment after sale.

Where judgment for deficiency is asked in the complaint in an action to foreclose a mortgage, but provision for deficiency is erroneously omitted from the judgment entered in the action upon failure to plead, motion to correct the judgment by inserting the omitted provision should not be granted after a sale.

(Decided November 20th, 1892.)

Motion by plaintiff to amend judgment of foreclosure and sale.

This action was for the foreclosure of a mortgage made by the defendant Schliep upon premises in Brook-

Union Trust Company v. Schliep.

lyn. The complaint which demanded that he be adjudged to pay any deficiency which might remain, was duly served on him; he appeared by his attorney, and waived service of all papers except notices of sale and surplus, and thereafter made default in pleading. Judgment of foreclosure and sale was entered on September 26th, 1892, which through a clerical error, provided for no judgment of deficiency against said defendant. Under such judgment the premises were sold by the sheriff on October 26th, 1892, and bought in by the plaintiff for \$11,250. The deficiency arising on such sale amounted to \$435.34.

This motion is made to have the judgment amended by inserting therein a provision that the defendant Schliep pay any deficiency which may remain.

Edward W. Sheldon for plaintiff and motion.

The relief sought for is within the power of the Court to grant and has been allowed before in similar cases.

See Code of Civil Procedure, Section 723. "The Court may, after judgment, in furtherance of justice and as it deems best, amend any process, pleading or other proceeding."

In case of *Sprague v. Jones* (9 *Page*, 395), which was a suit for foreclosure of a mortgage and in which the plaintiff's counsel had omitted to ask for a judgment of deficiency against a defendant who was personally liable, the Chancellor said: "An additional order or decree must be entered as a consequential direction upon what is contained in the decree as enrolled rendering the defendant Graham personally liable for the deficiency."

In the *Produce Bank v. Morton* (67 *N. Y.*, 199), where the judgment had been entered against two defendants only, the court allowed an amendment so that it should be against the third defendant.

Union Trust Company v. Schliep.

In *Wood v. Martin* (66 Barb, 241), an action to foreclose a mortgage, the judgment was amended by changing the description after the sale had taken place.

In the case of the *N. Y. Ice Co. v. Northwestern Ice Co.* (21 How. Pr., 296), on a motion to amend the judgment, COMSTOCK, C. J. said: "It is suggested in the opposing papers that the judgment had become perfect and final before the motion was made. I do not see the force of this suggestion. The judgment was perfect as soon as pronounced and entered. It would become final when the time for appealing should expire. I think the power of the Court to modify or amend the judgment cannot be questioned."

A judgment of foreclosure and sale is necessarily interlocutory in character.

The amendment sought by this motion would not, in ordinary chancery practice, as followed in the Federal and many State Courts be needed, since the order granting a judgment of deficiency is customarily entered only after the amount of the deficiency is ascertained on the filing of the Master's or Sheriff's report. Under the practice in New York, the direction for a deficiency in the foreclosure judgment is purely contingent, and its omission does not prevent the court from making a proper order as soon as the essential facts are acquired.

The amendment sought for in this action is in furtherance of justice.

Charles Coleman Miller, for defendant, Schliep, opposed.

By entering judgment without obtaining decree of deficiency against defendant, plaintiff discharged defendant from personal liability. - Mutual Life Insurance

Union Trust Company v. Schliep.

Co. v. Hoyt, 15 *Weekly Dig.*, 489. This was an appeal by the defendant Hoyt from a judgment of foreclosure and sale. The trial Court had found that plaintiff was entitled to a personal judgment against Hoyt for any deficiency but the judgment was entered without relief as against Hoyt for the deficiency. In rendering the opinion at General Term CULLEN, J., *held* that "by entering judgment without making Hoyt liable for the deficiency the plaintiff discharged Hoyt from such liability."

Plaintiff's motion is made too late. It should have been made before the sale. *Fleishhauer v. Voellner*, 9 *Abb. N. C.*, 372, where, on a motion to correct a judgment of foreclosure and sale, VAN VORST, J., said: "I am of opinion that the motion comes too late. If there was anything wrong in the judgment, relief should have been asked before the sale was made following its terms."

Courts can allow amendments only "in furtherance of justice" (*Code Civ Pro.* § 723). To grant an application of this kind would be unjust and inequitable. The defendant's position is changed to his prejudice by reason of plaintiff's error, and an amendment should not be allowed to the injury of the defendant. A defendant has a right to rely on the judgment of foreclosure and sale as finally determining the issues, and liabilities and rights of parties. If such judgment fails to provide for the payment by a defendant of a deficiency, he has no further concern in the matter, and is not interested in having the property sold to the best advantage or in buying it in himself to save a deficiency judgment.

Plaintiff's first point only maintains the power of the Court to amend in furtherance of justice, which is conceded. The case of *Sprague v. Jones* cited by plaintiff's counsel, is the only one found that approaches the one before the Court in similarity. At first reading it would seem to be decisive of the question raised on this motion,

Baldwin v. Baldwin.

but a careful study of the case discloses the all important point that it does not appear that the amendment was made *after the sale*. On the contrary, the language of the Chancellor plainly indicates that the amendment was *before the sale*. I do not think this application should be granted after a sale. Motion denied.

BALDWIN, RESPONDENT, v. BALDWIN, *et al*, APPELLANTS ; BORCHARDT AS EXECUTRIX, ETC., AND ANOTHER, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
DECEMBER, 1893.

§ 1532 *et seq.*

Partition—property held in joint tenancy may be partitioned or sold although some of the joint tenants object.

Real property owned and possessed by joint tenants may be partitioned or if an actual partition cannot be had, sold, and the proceeds divided at the suit of one of the joint tenants and although his co-tenants object.

Cloos v. Cloos (55 Hun, 450) ; Jooss v. Fey (129 N. Y., 28) followed.
(Decided December 15, 1893).

Appeal from an interlocutory judgment directing a sale of certain real property in an action for its partition.

On July 18, 1888, Margaret Baldwin, being then seized in fee of the premises 236 Henry street, New York City, conveyed them to four of her children, the plaintiff William A. Baldwin, and the defendants Jane E., Aphra

Baldwin v. Baldwin.

and Frances Baldwin, habendum in fee, "as joint tenants, and not as tenants in common."

On or about January 24, 1893, the plaintiff executed an instrument, which was recorded as a mortgage and which after reciting an indebtedness of \$850 to James A. Donegan in consideration thereof, granted and released to him so much of the premises described in the complaint "as may be sufficient to yield and pay on a sale thereof, the sum of \$850." The interest so acquired was transferred to the defendant, David E. Durham, by an instrument dated January 24, 1893.

Thereafter this action was brought.

After the commencement of the action the plaintiff executed a mortgage on his share of the property to Louise Borchardt, as executrix, &c., and a supplemental summons and complaint were served upon her.

All of the defendants appeared in the action, and answered.

The defendants Baldwin served a joint answer, in which they denied any knowledge or information sufficient to form a belief as to the allegations of the complaint setting forth the encumbrances on plaintiff's share of the premises; denied the plaintiff's allegations as to what the shares of the parties were; alleged "that the several alleged instruments, conveyances, and mortgages in no way transfer, encumber or effect the property described in the complaint, except only in the event of the plaintiff herein surviving all these defendants; . . . that they are each seized of and have an estate of inheritance in and to the whole of said premises dependent upon such defendant being the last survivor of such joint tenants; . . . that they have each a life estate in said premises and that they have not, nor has either of them, consented in writing or otherwise, to a sale or partition of said premises."

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Baldwin v. Baldwin.

The separate answer of the defendant Borchardt as executrix, etc., set forth facts designed to show that her mortgage was a lien upon plaintiff's share of the premises prior and superior to that held by the defendant Durham, and the defendant Durham pleaded facts to show that his claim was superior to that of the defendant Borchardt, executrix, etc.

The plaintiff, on the ground that no issue was raised by the answers of the defendants, moved at Special Term held by Mr. Justice Truax for a reference to take proof of title, and as to whether the property could be partitioned.

This motion was granted, and a reference directed to Mr. Gilbert M. Speir, Jr., and he, after hearing the proofs of the parties, reported that the title was in the plaintiff and in the defendants Baldwin as joint tenants in fee subject to certain incumbrances, and that it could not be actually partitioned, but should be sold and the proceeds divided.

The defendants Baldwin duly excepted to the referee's report.

The plaintiff moved to overrule the exceptions, confirm the referee's report and for judgment, and after hearing all the parties the report was confirmed at a special term held by Mr. Justice O'Brien and an interlocutory judgment entered directing a sale of the property and a division of the proceeds. This appeal from said judgment was thereupon taken by the defendants Baldwin.

Francis J. Moissen (Thomas J. McKee, Attorney), for defendants Baldwin, appellants.

The estate of joint tenancy is an estate recognized as existing and authorized to exist by the laws of this State; the nature and properties of such estate being the same as

established by the common law. 3, *R. S.* (7th Ed.) p. 2179, § 43.

“Joint tenants are persons who hold lands by a joint title created expressly by one and the same deed or will. The estate must be of the same duration, or nature and quantity of interest; whether the estates of the several joint tenants be in fee, or in tail, or for life or for years.” 4 *Kent's Com.*, 357.

Each of them may enter upon the land and exercise at his pleasure every reasonable act of ownership—and is liable to his companion for any waste committed upon the estate, and are accountable to each other for the rents and profits of the joint estate; and are regarded as having one entire and connected right—and they must join and be joined in all actions respecting the estate.

Joint tenants are said to be seized *per my et per tout*, and each has the entire possession as well of every parcel as of the whole. A joint tenant, in respect to his companion, is seized of the whole; but for the purposes of alienation, and to forfeit, and to lose by default in a *præcipe*, he is seized only of his undivided part or proportion.

The doctrine of survivorship or *jus accrescendi* is the distinguishing incident of title by joint tenancy, and therefore at common law the entire tenancy or estate upon the death of any of the joint tenants went to the survivors, and so on to the last survivor, who took an estate of inheritance. The whole estate or interest held in joint tenancy, whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor and vested in him absolutely. It passed to him free and exempt from all charges made by the deceased cotenant. 4, *Kent Com.*, 359, 360.

The statute, with respect to the estate of joint tenancy, has never been repealed or modified. So that there can be no question but that such an estate is recognized and existing under the laws of this State.

Baldwin v. Baldwin.

The present estate as regards the survivor, whoever he may be, is a contingent estate. 3 *R. S.* (7*Ed.*) p. 2175, §§ 1, 2, 7, 8, 9, 10; 3 *Id.*, p. 2176, § 13.

This under the revised statutes is an estate which must descend to the last survivor of four persons, joint tenants. Who will be that last survivor? No one can now say. But the right to the benefit or interest which may occur to the survivor by reason of his survivorship cannot be taken away from him without his consent. And any alienation lien created, or forfeiture suffered by one joint tenant can only affect his share of the rents unless he survives the other joint tenants.

No act of the owner of an intermediate or precedent estate can or may defeat an expectant estate. 3 *R. S.* (7 *Ed.*) p. 2178, § 32.

The provisions of the Code of Civil Procedure for partition relative to joint tenancies do not apply to the case at bar. *Code Civ. Pro.* §§ 1532, 1533.

These two sections of the Code are the only sections allowing partition of real property.

In section 1532 the joint tenant seeking partition must have either of the following estates: (1) An estate of inheritance. (2) An estate for life. (3) An estate for years.

In the present case neither the plaintiff nor the defendants have an estate of inheritance, viz., a fee simple absolute; they have only one estate, viz., a joint tenancy which is, as described by Chancellor Kent (*supra*), an estate as between them in the whole and not in a part, with no estate of inheritance excepting to the survivor, who then took by reason of his survivorship an estate of inheritance or a fee simple.

There is no estate for life created, for an estate for life is an estate limited either upon the life of the person designated who takes the estate or upon some other one designated life. Here the estate creates an estate in fee

absolute in each of the joint tenants dependent or contingent upon his surviving the others.

It is not an estate for years. The deed is silent as to years, and the grant is for no fixed period of time.

So that, notwithstanding the ambiguous language of section 1532, it seems clear that it does not authorize partition in this case, as neither the plaintiff nor the defendants Baldwin have any other estate than that created by the deed from their mother.

Under section 1533 the joint tenants seeking partition must be possessed of either one of two estates: (1) A vested remainder. (2)—A reversion. . . .

Neither of the parties to this suit have therefore any such estate or interest as would authorize a partition under section 1533 of the Code.

In the State of New York, when a joint tenancy is lawfully created, the common law incidents belonging to that tenancy follow. And the right of survivorship is the principal incident of the estate. *Purdy v. Haight*, 92 *N. Y.*, 453. . . .

No partition can be had at the instance of one of four *joint tenants*, the other three objecting and refusing to consent to the partition sought to be had. Section 1532 of the Code of Civil Procedure is a repetition of the provisions of the Revised statutes relative to partition of lands. 3d *R. S.*, (5th Ed.) p. 603, § 1. And under that section of the Revised Statutes the Court of Chancery held that a party who has a mere future contingent interest in an undivided share of real estate cannot sustain an action for the partition of real property. *Striker v. Mott*, 2 *Paige*, 387.

To maintain partition between joint tenants one must have in addition to his estate of joint tenancy some other interest or estate, which must be either an estate of inheritance, or for life, or for years, in some part of the realty to be partitioned.

Baldwin v. Baldwin.

A reading of section 1532 of the Code shows that it was clearly the understanding of the Legislature that joint tenants and tenants in common might be seized of different estates in the same property, and one object of the section evidently is to afford relief to a person having an estate in property of the nature described, from which without a partition he might receive no benefit.

This section does not say that when two or more persons hold and are in possession of real property as joint tenants or tenants in common, in which they have an estate of inheritance, or for life, or for years, they may maintain an action, but provides that where two or more persons hold and are in possession of real property as joint tenants or tenants in common, where *either of them* has such an estate he may maintain such an action; clearly embodying the idea that when there is a right of possession—and possession upon the part of a person either holding an estate of inheritance as to part, or an estate for life, or for years—he is a tenant in common. *Tilton v. Vail*, 17 *N. Y. Civ. Pro.*, 197.

This would seem to preclude joint tenants who have but one joint freehold or but one estate in the whole and no estate in any particular part.

The execution and delivery of a mortgage by one of several joint tenants on his interest in the joint estate does not sever, change or in any way affect the nature of the estate of *joint tenancy*, nor does it make the mortgagee a tenant in common with the other joint tenants. . . .

The only manner in which a joint tenancy may be destroyed is by an actual voluntary division of the property and holding it in severalty by the joint tenants all joining in releases to each other. . . .

“No greater estate or interest shall be construed to pass by any grant or conveyance hereafter executed than the grantor himself possessed at the delivery of the deed,

or could then lawfully convey," &c. 3 *R. S.*, (7th Ed.) p. 2195, § 143.

Such a conveyance cannot in any way affect the estate rights or interests of the other joint tenants.

The distinguishing element of joint tenancy still remains "survivorship," and the grantee acquires only the interest his grantor had and his co-joint tenants have, viz., a right to a share of the rents and the fee contingent on his (the grantor) surviving the others. It is a mere fiction then to say that the joint tenancy is destroyed by a conveyance by one of several joint tenants. How, then, could the mortgaging of his interest by one of several joint tenants change his joint tenancy into one of tenancy in common? We claim that such a thing is impossible under the laws of this State. 3d *R. S.*, 5th ed. p. 13, § 32. Joint tenants are seized *per my et per tout*, yet it is in the power of any one of them to dispose of his interests in his lifetime, subject to the right of survivorship of his co-tenant. *Hubbard v. Gilbert*, 25 *Hun*, 600.

And the interest conveyed or mortgaged in this case can only be the life interest of the grantor, together with the contingent fee simple, provided he (the grantor) survived the other joint tenants.

H. Huffman Browne ; (*James A. Donegan, Attorney*)
for plaintiff, respondent.

One joint tenant may compel a partition of the joint property, or if a partition cannot be had, a sale of the property and a distribution of the proceeds, notwithstanding his co-tenants object.

I.—The Courts have always held that an action for a partition or sale of property held in joint tenancy is main-

Baldwin v. Baldwin.

tainable. *Joos v. Fey*, 129 *N. Y.*, 17; *Cloos v. Cloos*, 24 *Abb. N.C.*, 219, S.C. 55 *Hun*, 450; *Wurz v. Wurz*, 27 *Abb. N.C.* 58; *Miller v. Miller*, 29 *Abb. Pr. N.S.* 444; *Hughes v. Devlin*, 23 *Cal.* 301.

II.—This right is clearly given by the Code of Civil Procedure.

Section 1532 of the Code of Civil Procedure expressly authorizes the bringing of an action by one of several joint tenants for a partition or sale.

No distinction is made in this or any other section of the Code between joint tenants and tenants in common, so far as an action for partition is concerned, and wherever one is spoken of the other is referred to.

Section 1546 provided that where the property is "so circumstanced that partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article (2 Art. of Ch., 14), must direct that the property, or the part thereof which is so circumstanced be sold at public auction."

The only case in which it is provided in that article that a sale shall not be had is stated in section 1533, and is where the action is brought by the owner of a vested remainder or reversion for a partition, subject to the interest of the person holding the particular estate therein, and the person holding such particular estate refuses to consent to a sale.

Here the parties are neither remaindermen nor reversioners, but own in fee, and are in actual, as distinguished from constructive, possession of the property in suit.

That the statute intended to give exactly the same rights and remedies to joint tenants as are given to tenants in common is shown, not only by the fact that they

are always coupled together in the provisions relating to partition, but also by the nature and occasion of the first statute on the subject, from which our present law is derived.

At common law, except by local custom in a few favored communities, joint tenants and tenants in common were both alike without power to compel partition. *Alnatt on Partn.*, p. 55. A coparcener could compel partition, and when he did the parties took in severalty. *Id.*

To remedy this evil in 1540 was enacted the statute of Henry VIII., Chap. 1, which provided: "That all joint tenants and tenants in common that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights or in the rights of their wives of any manors lands, tenements or hereditaments within this realm of England, Wales or the marches of the same, shall and may be coacted and compelled, by virtue of this present act, to make partition between them of all such manors, lands, tenements and hereditaments as they now hold or hereafter shall hold as joint tenants or tenants in common, by writ *De Participacione facienda* in that case to be devised in the King, our sovereign Lord's Court of Chancery, in like manner and form as co-parceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law."

This statute applied only to estates of inheritance, and, therefore, in 1541 was enacted the statute 32, Henry VIII., Chap. 32, which referred to the previous statute, and provided for partition between joint tenants and tenants in common of estates for life or years.

The procedure, under the acts referred to, was simplified by statutes 8 and 9, Will. III., Chap. 31, and with that exception the statutes of Henry VIII. remained unchanged in England until long after the American Revolution.

The effect of partition under this statute as well as

Baldwin v. Baldwin.

prior to the statute in the cases where partition was allowable was to give to the parties to whom the property was allotted a complete and independent title to the parts set off to him. The partition severed the estate forever. *Hetley's Eng. C. P., Rep.*, 14. *Alnatt on Partition*, 141. Alnatt in his work on partition, says, (p. 146): "It seems that the partition affected the right and inheritance as well as the possession."

This statute was simplified as to procedure and extended as to remedy by providing for a sale where an actual partition cannot be had was re-enacted in the Colony and State of New York and from it our present statutes are derived.

III.—Text books have always taught that land held in joint tenancy may be partitioned the same as though it was held as tenants in common. *Washb. Real Prop.*,* 427; *Tiedeman on Real Prop.*, § 262; 11 *Am. & Eng. Enc. Law*, 1,144; 2 *Black Com.*, Chap. 12, II., 3; *Williard's Eq., Juris.*, 699, 700; 4 *Kent's Com.* (6 Ed.), p. 364.

IV.—There is nothing in the nature of a joint tenancy which will prevent or should prevent a partition or sale of the joint estates.

The contention of the defendants Baldwin is founded upon the erroneous assumption that survivorship is a property or right of which they cannot be deprived without their assent.

Survivorship may be terminated by act of one joint tenant without the concurrence of the others. *Tiedman on Real Prop.*, § 238; 4 *Kent's Com.* (6 Ed) p. 364; 2 *Black Com.* Chap. 12, II; *Williams on Real Prop.* p. 103;* 1 *Hilliard on Mortg.* p. 12, § 22; *Simpson v. Ammons*, 1

Baldwin v. Baldwin.

Binn., Pa., 175; 11 *Amer. & Eng. Enc. Law*, 1143. "A covenant by a joint tenant to sell severs the joint tenancy in equity, though not in law." *Brown v. Randle*, 3 *Ves. Jr.*, 257; *Hinds v. Ferry*, 1 *Miss.*, 80. "If one tenant conveys his share this is a severance of the joint tenancy." 1831 (1st Circ. Me.) *Robinson v. Coddman*, 1 *Sumn.*, 121.

The joint tenancy here is of an estate of inheritance, and no elements of a life estate are involved.

The plaintiff and defendants Baldwin are joint tenants *in fee simple absolute*.

The habendum of the deed creating the tenancy is in fee and the finding of the referee that the tenancy is an estate of inheritance in fee simple absolute is not excepted to. Further: The grantor in the deed creating the joint tenancy was the owner in fee simple absolute. By that deed she conveyed to them as joint tenants the same title she had. 748, § 1.

It is well settled that a joint tenancy may be in fee simple. *Williams on Real Prop.* pp. 99, 109; 2 *Black Com.*, Chap. 12 Subd. II; 1 *Wishburne, Real Prop.* (4th Ed.), 1643; 11 *Amer. & Eng. Law*, 1068; *Co. Lit.*, 183 B.

Another objection to the contention of the counsel representing the defendants Baldwin, is, that if the deed created a life tenancy in each of the four for the life of the others with remainder over to the last survivor the power of alienation has been suspended for more than two lives in being and the deed is void. 1 *R. S.* 732, § 15; *Banks v. Phelan*, 4 *Barb.* 80; *Bowers v. Beekman*, 16 *Hun.*, 268; *Fowler v. Ingersoll*, 19 *St. Rep.*, 214; *S. C. 2 N. Y. Supp.*, 833; *Schnarre v. Humming D. R. Dec.* 23, 1882; *Colting v. Schermerhorn*, 25 *St. Rep.*, 125.

Where two constructions of an instrument are possible that construction will be adopted which will make the instrument valid, and that avoided which would vitiate it. *Richards v. Warring*, 39 *Barb.*, 42.

Baldwin v. Baldwin.

Even if this was a life estate with remainder over to the survivor, partition could be had, for a life estate prevents a partition only where it is paramount and of the whole estate. See *Tilton v. Vail*, 53 *Hun*, 324; S. C., 17 *N. Y. Civ. Pro.*, 192, in which it was held that a tenant, by the courtesy of an undivided part of real property, might maintain partition and have a sale.

The Code takes care of the rights of the parties where they are contingent by providing for the fixing of the proportional value of the right or estate according to the law applicable to annuities and survivorship. *Code Civ. Pro.*, § 1570, as amended by Laws 1892, Chap. 581.

Edward S. Peck (Peck & Field, Attorneys) for defendant Borchardt as executrix, etc., respondent.

The fact that the plaintiff and his sisters are joint tenants, cannot affect his right to a partition or to a partition and sale of the premises and a division of the proceeds. The language of the Code of Civil Procedure expressly includes the case of joint tenancy. *Code Civ. Pro.* § 1532.

The plaintiff and his sisters are within the provisions of that section of the code; as joint tenants they are seized of, and are in possession of, an estate of inheritance in the premises described in the complaint.

Section 1533 of the Code has no application to the present case, as it refers solely to persons holding, as joint tenants, etc., a vested remainder or reversion, subject to the interest of some person holding a particular interest in the property. It does not apply to one possessed of an estate of inheritance in an undivided portion of the premises. *Mason v. Mason*, 2 *How. Pr. N. S.*, 514.

It cannot be said that the plaintiff and his sisters are, or that either of them is, seized of a remainder or reversion; they are seized of the estate in possession. There

Baldwin v. Baldwin.

is simply a right to the survivor or survivors to receive the premises on the death of either; but this right may be defeated by a severance of the interests during the lifetime of the parties.

The right of a survivor or survivors to take the whole estate exists only where a joint tenant's interest continues until his death. Though thus united in their ownership, the joint tenant may convey his share to a stranger, who thereby becomes a tenant in common with the other cotenants. 1 *Washb. on Real Prop.* 412* § 27. See also 11 *Am. & Eng. Enc. of Law*, 1092.

The relation of joint tenancy may be severed. 1. By agreement of the parties. 2. By acts amounting to a destruction of the common ownership. 3. By the Court in an action brought for that purpose, and where it cannot be divided the property may be sold and the proceeds divided. *Id.* pp. 1142 and 1144.

☞ A mortgage by a joint tenant of his share to a stranger would be effectual against survivorship and may amount to a severance of the joint estate. (*Id.*)

The early history of the right to a partition of real property showing the right to have existed since the time of Henry VIII. may be found in 17 *Am. & Eng. Ency. of law*, p. 677, *et seq.* See also 2 *Blacks. Com.*, Chap. 12. (*Chase's Blackstone*, 2nd Ed., p. 366.) *Willard's Equity Jurisprudence*. (Potter's Ed.) p. 700.

Mr. Justice Lawrence has considered the rights of joint tenants under a similar deed and has held that partition may be maintained. . . . *Wurz v. Wurz*, 15 *N. Y. Supp.*, 720.

In the present case the plaintiff and his sisters, as joint tenants, are actually seized in possession of an estate of inheritance in the premises in question. These are the only requirements of Section 1532 and it necessarily follows that partition may be maintained.

Baldwin v. Baldwin.

PARKER, J.—This appeal brings up for review a judgment in partition of certain premises conveyed to the plaintiff and defendants as joint tenants, the deed declaring that the estate was conveyed to them as “joint tenants, and not as tenants in common.”

The joint tenants other than the plaintiff deny his right to maintain an action of partition, and insisted upon the trial, and again upon this appeal, that compulsory partition of lands owned and possessed by joint tenants cannot be made; and their contention is founded on the doctrine of survivorship, which is the distinguishing incident of title by joint tenancy. That, as the whole estate or interest held in joint tenancy may pass to the last survivor, and become vested in him absolutely, there is secured to him a right to such interest as may accrue to the survivor—a right which cannot be taken away from him without his consent.

A serious consideration of the appellants' contention is embarrassed by the fact that section 1532 of the Code of Civil Procedure expressly authorizes partition of such an estate as was conveyed to these parties as joint tenants.

It reads as follows: “Where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition thereof cannot be made, without great prejudice to the owners.”

It is suggested by the appellants that a joint tenant cannot be deprived of his right of survivorship by statute. If that suggestion be seriously made, it certainly requires no other answer than that prior to the execution and delivery of the deed by which the joint tenancy in question as created a statute was enacted providing that, in case

an estate of inheritance or for life or for years should be vested in two or more persons as joint tenants, any one of them may maintain partition. Thus the parties to the conveyance were apprised at the time of its making and execution that the right of survivorship would depend upon the consent of the joint tenants, and their conveyance will be deemed to have been made with reference and in subordination to this provision of the statute.

The right to maintain such an action has been recently considered in *Cloos v. Cloos*, 55 *Hun.* 450. The conveyance was to the husband and wife, "as joint tenants, and not as tenants in common." The wife subsequently commenced an action of partition, and the special term, reaching the conclusion that the action was not maintainable, dismissed the complaint. This judgment the general term reversed, holding that where husband and wife hold lands as joint tenants, an action of partition will lie at the suit of either.

In *Jooss v. Fey*, (129 *N. Y.* 23), the premises in controversy were conveyed to husband and wife as joint tenants. Subsequently the wife conveyed her interest to the plaintiff, who brought an action of partition. The court held that the interest acquired by the wife was alienable by her, and, plaintiff having acquired title through her conveyance to him, he was entitled to maintain partition under section 1532 of the Code, quoted *supra*.

But the authority to partition lands held by joint tenants is not by any means of modern creation, as its discussion at this time would seem to suggest. At common law it was the rule that neither joint tenants nor tenants in common could compel partition. *Alln. Partit.* p. 55. To remedy this evil, in 1540 the statute of Henry VIII. c. 1, was enacted, providing for the partition of estates of inheritance vested in joint tenants or tenants in common; and the year following, by chapter 32, the provisions of the first act were extended so as to include estates

Tallman v. Bernhard.

for life or for years. The procedure provided by those acts was simplified by *St. 8 & 9 Wm. III. c. 31*. "At the close of the Revolution, and in 1788, the above-mentioned English statutes were re-enacted. 2 *Greenl. Comp.* 13. These statutes put the right to compel partition between tenants in common and joint tenants upon the same footing as coparceners." *Will. Eq. Jur.* 699, 700; *Kent Com.* (6 *Ed.*) p. 364. The inadequacy and inefficiency of the statutory remedies led courts of chancery to assume jurisdiction in partition. 17 *Amer. & Eng. Enc. Law*, 679; *Story, Eq. Jur.* § 651.

An investigation of the subsequent development of the subject of partition fully bears out the statement in 11 *Amer. & Eng. Enc. Law*, 1144, in which the matter is accurately summed as follows: "Through the medium of equity, and by means of statutory enactment, the right to have partition made has become an incident to ownership in joint tenancy and tenancy in common in all the United States and in England."

The judgment should be affirmed, with costs.

VAN BRUNT, P. J. concurred.

TALLMAN, RESPONDENT, v. BERNHARD, APPELLANT.
SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
JANUARY, 1894.

§§ 3229, 3232.

Costs—right to where demurrer sustained.

The right to costs is absolute where in a common-law action a demurrer to the complaint is sustained, unless an issue of fact remains undisposed of, in which case only costs are in the discretion of the court and may be denied either party or awarded either absolutely or to abide the event.

(Decided January 12, 1894.)

Tallman v. Bernhard.

Appeal by defendant from so much of a judgment of the New York County special term sustaining a demurrer to the complaint as refused to award the defendant costs.

Carlos C. Alden, for defendant, appellant.

James M. Smith, for plaintiff, respondent.

PER CURIAM.—(VAN BRUNT P. J., and O'BRIEN and PARKER, J. J.)—The court, in sustaining the demurrer, erred in refusing to grant the demurrant costs.

There is only one exception to the rule that costs are absolute where a demurrer to a complaint in a common-law action is sustained, and that is furnished by section 3232 of the Code, which provides that where an issue of law and an issue of fact are joined, and the issue of fact remains undisposed of, it is in the discretion of the court to deny costs to either party, or award costs, either absolutely, or to abide the event.*

So much of the order and interlocutory judgment as refuses to allow costs should be reversed, with \$10 costs and printing disbursements.

* In *Thompson v. Stanley*, 22 N. Y. Civ. Pro., 384, it was held that where a demurrer to a complaint is overruled, with leave to defendant to answer over on payment of costs, the costs taxable in favor of the defendant, and which may be inserted in the interlocutory judgment are the costs which by the operation of the provision allowing the amendment will be vacated, and do not include costs before notice of trial and the expenses of entering, docketing and satisfying final judgment and Sheriff's fees thereon.

Stewart v. Paton.

STEWART v. PATON.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, OCTOBER 1893.

§§ 1434, 3256, 3297.

Costs—disbursements made for extra advertising in action for partition cannot be taxed.

A referee appointed to sell real property under a judgment in an action for partition can be allowed out of the purchase money those disbursements only, which a sheriff is authorized to retain out of the proceeds of real estate sold by him upon an execution; he cannot be allowed the costs of advertising done by him which he is not required by statute and has not been directed by the court to do.
(Decided October 17, 1893.)

Motion by the plaintiff that the referee appointed by the interlocutory judgment to sell real property therein described be allowed to retain from the proceeds of the sale, the sum paid by him for extra advertising of the sale.

The action was brought to secure a partition or sale of certain real property situate in the city of New York. An interlocutory judgment was entered directing a sale by a referee named therein. He sold accordingly and in addition to the notices of sale required by statute inserted an advertisement under the appropriate heading in certain daily papers published in the city of New York and caused bills advertising the sale to be printed and posted. The attorneys for the defendants refused to consent to the allowance to the referee of the expense of such extra advertising and this motion was thereupon made.

 Stewart v. Paton.

James N. Platt, for plaintiff and motion.

Cited *Code Civ. Pro.* §§ 1434, 3256, *Equitable Life Ass. Soc. v. Hughes*, 19 *N. Y. Civ. Pro.*, 326; *Prentice v. Jansen*, 79 *N. Y.* 478.

Strong & Cadwalader, for defendants, opposed.

Cited, *Code Civ. Pro.* §§ 3307 sub'd 9, 11; 3297; *Daly v. Jacob*, 2 *Abb. N. C.* 97; *Richards v. Richards*, 2 *Id.* 93; *Maher v. O'Conner*, 1 *N. Y. Civ. Pro.* 158; *Downing v. Marshall*, 39 *N. Y.* 380; *Croft v. Brant*, 58 *Id.* 106; *Lynch v. Meyer*, 9 *Daly* 260; *Race v. Gilbert*, 102 *N. Y.* 298; *Louis v. Ireland*, 2 *Abb. L. Jour* 288.

INGRAHAM, J.—I think that the disbursements of the referee that can be allowed to him out of the purchase money must be limited under section 3297 of the Code to the disbursements which a sheriff is authorized to retain out of the proceeds of real estate sold by him upon an execution.

Whether or not the Court would have the power prior to the sale to authorize advertisements of the sale in addition to that specifically required by the Code is not in question.*

* In *BALDWIN v. BALDWIN* (*Supreme Court, First Department, New York County, Special Term, February, 1894*), an interlocutory judgment directing a sale by a referee was duly entered, and after its affirmance by the general term (see ante p. 269) publication was begun of the notice of sale on February 28, 1894, as required by statute. The plaintiff moved for an order permitting the referee to do extra advertising "by posters and postal cards at an expense to be limited by the court,"—(*H. Huffman Bruns*, for plaintiff and motion; *F. J. Moissen*, for defendants Baldwin opposed)—The following memorandum of decision was filed February 16, 1894:

Bartlett v. Mugett.

The advertisement directed by the referee, was not ordered by the Court, and is not such an advertisement as the sheriff is authorized by the Code to make where the sale is upon an execution. I do not think, therefore, I have any authority to order this advertisement to be paid out of the share of the party who did not authorize the advertisements to be made, and who now oppose it.

The motion must therefore, be denied, and the advertisements must be paid for out of the share of the parties who authorized it. No costs.

BARTLETT, APPELLANT, v. MUGETT, RESPONDENT.

**SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,
JANUARY, 1894.**

§§ 2863, 2950, 3068.

Justices' Court—jurisdiction where amounts claimed in pleadings exceed \$400—appeal.

A justice is not deprived of jurisdiction of an action and required to dismiss it merely because the amount claimed in the pleadings exceeds \$400. Before he can dismiss it, it must be made to appear to his satisfaction by proof, that the amount in dispute exceeds his jurisdiction.

A ruling of a justice that he has not jurisdiction of an action because the amount in dispute exceeds \$400 and a dismissal on that ground, may be reviewed upon appeal to a county court, on which a new trial is demanded.

ANDREWS, J.—As I have not been referred to any provision of the statutes or rules which authorize me to make the order, the motion will be denied without costs.

Bartlett v. Mugett.

Crannell v. Comstock (12 Hun. 293); Kirk v. Blashfield (6 7, & C. 509) distinguished.

Where in an action in a justice's court the complaint set forth two causes of action, one for work, labor and services. \$490 on which \$300 had been paid and another for goods sold and delivered \$39.02 for which \$40 had been paid, thus slightly overpaying it, and demanded judgment of \$188.04 and interest and the answer admitted that some, but not the quantity of work set forth in the complaint was done; alleged payment of \$340 on account thereof and as a counterclaim pleaded that the plaintiff was indebted to defendant on a mutual account for goods furnished \$110.—*Held* that it was error to dismiss the action on the ground that the sum total of the accounts of both parties proved to the satisfaction of the justice exceeded \$400; that it did not exceed that sum, but amounted to just \$298.04.

(Decided January 18, 1894).

• Appeal by plaintiff from an order of the Cattaraugus County Court dismissing plaintiff's appeal from a judgment of a justice of the peace.

• The opinion states the facts.

E. D. Northrup for plaintiff, appellant.

G. M. Rider, for defendant, respondent.

LEWIS, J.—The plaintiff brought his action in the justice's court in Cattaraugus County, and claimed in his complaint, for his first cause of action, that the defendant was indebted to him for work and services in pressing into bales 280 tons of hay at the agreed price of \$1.75 a ton, and that there became due to him therefor \$490; that the defendant had not paid any part thereof, except the sum of \$300; and that there remained due, on account thereof, the sum of \$190. For his second cause of action he alleged that the defendant was indebted to him in the sum of \$39.02 for goods, wares, and merchandise sold and

Bartlett v. Mugett.

delivered to the defendant, and that the defendant had paid thereon the sum of \$40, thereby slightly overpaying the same. He demanded judgment against the defendant for \$188.04, with interest thereon from the 1st day of December, 1892.

The defendant interposed an answer, admitting that the plaintiff pressed a quantity of hay for him at the price stated in the complaint, but that the amount was less than 280 tons, and that he had paid the plaintiff, to apply thereon, divers sums of money, amounting, in all, to \$340; and for a further answer alleged that the plaintiff was justly indebted to him for goods furnished, and upon mutual dealings between the parties, in the sum of \$110, which was pleaded as a counterclaim, and demanded judgment against the plaintiff for \$110.

The issue being thus joined, the defendant thereupon moved for a discontinuance of the action on the ground that it appeared from the pleadings that the sum total of the accounts and demands of both parties in dispute exceeded the sum of \$400, and the justice, against the objections of the plaintiff, granted the motion, and dismissed the case, and entered judgment against the plaintiff for costs.

The plaintiff served a notice of appeal from the justice's judgment to the County Court of Cattaraugus County, and in said notice demanded a new trial in that court.

The defendant thereupon moved the county court for an order dismissing the appeal on the ground "that the justice had no jurisdiction, and could not take cognizance of the action, for the reason that the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeded \$400."

The motion was granted, and an order entered, dismissing the appeal, and from such order the plaintiff appealed to this court.

The justice unquestionably erred in dismissing the action, as it will be seen by an examination of the pleadings that the sum total of the accounts of both parties in dispute did not exceed \$400. They, in fact, amounted to just \$298.04. The justice had no authority to dismiss the action until it was made to appear to him by proof that the amounts in dispute exceeded his jurisdiction.

It is provided by subdivision 4 of section 2863 of the Code of Civil Procedure that "where in a matter of account the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400.00, the justice cannot take cognizance of the action." He is not ousted of jurisdiction because the amount claimed in the pleadings may exceed that amount. If that were the case, the defendant in every case could oust the justice of jurisdiction by setting up in his answer a claim for more than \$400, no matter how fictitious the claim might be.

The Code requires, before he shall dismiss the action, that he shall be satisfied by evidence. *Parker v. Eaton*, 25 *Barb.* 122; *Glackin v. Zeller*, 52 *Barb.* 147; *Bailey v. Stone*, 41 *How. Pr.* 349. In the absence of any proof in the case, the defendant's counsel succeeded in inducing the justice to dismiss the action solely upon what he claimed appeared upon the face of the pleadings, and, as we have seen, the pleadings failed to show that the amount involved was beyond the jurisdiction of the justice.

The defendant's counsel contends that, the justice having rendered a judgment of discontinuance, it is conclusive upon the question of the amount involved until it is reversed, and that the only manner provided by the Code for reviewing it is by appeal upon questions of law only. Whether he is right in this contention depends upon the construction which shall be given to provisions of the Code.

Section 2950 provides that "where upon the trial of

Bartlett v. Mugett.

an action the sum total of accounts of both parties proved to the satisfaction of the justice exceeds \$400.00 judgment of discontinuance must be rendered against the plaintiff with costs."

Section 3068 provides: "Where an issue of fact or an issue of law was joined before the justice and the sum for which judgment was demanded by either party in his pleading exceeds \$50.00, * * * the appellant may in his notice of appeal demand a new trial in the appellate court, and thereupon he is entitled thereto."

Here, as we have seen, each party did demand judgment for a sum exceeding \$50; so that the case falls within the letter of this section.

If a new trial is not demanded in the notice of appeal, then the case is reviewed upon questions of law only; but, if a new trial be demanded, then all questions of law and fact are before the appellate court for consideration; and we see no good reason for any embarrassment to arise upon a new trial in the county court in this case, as it will be quite apparent when the trial comes on, from an inspection of the pleadings, that the justice in fact had jurisdiction of the action.

Had the justice proceeded with the trial, and decided upon conflicting evidence, that the amount involved did not exceed the limit of his jurisdiction, the defendant unquestionably would have had the right to appeal to the county court, and there try the question over again.

If, as contended by defendant's counsel, the justice's judgment can only be reviewed upon an appeal upon questions of law, it follows that there must be, in this case, four hearings before the litigation is ended,—two in justice's court, and two in the county court. There does not seem to be any occasion for pursuing such a course.

The question here presented should not be confounded with a civil action in a justice's court to recover damages for an assault and battery, libel or slander, for in

Bartlett v. Mugett.

that class of actions the justice has no jurisdiction of the subject-matter. Here he had jurisdiction until it is proven upon the trial that the accounts in dispute exceed the limit mentioned. It does not, therefore, follow because a new trial can be had in the appellate court in this case, that a new trial could be had in the other class of actions. In the one case the question of jurisdiction depends, as we have seen, upon the evidence. Not so in the other cases.

We are not referred to any case where the precise question here presented has been adjudicated.

In *Crannell v. Comstock* (12 *Hun*, 293), the action was commenced in justice's court, the plaintiff's complaint was for work and materials, and the amount claimed by him was \$115.50. The defendant pleaded a set-off for goods sold and delivered to the plaintiff, to the value of \$3,000, for which sum he claimed judgment. Both parties introduced evidence before the justice in support of their respective claims. The defendant recovered a verdict for \$43.65. An appeal was taken to the county court for a new trial, and the respondent's counsel, in that court, raised the question as to the jurisdiction of the justice because the total of the accounts exceeded \$400. It was held, on an appeal to this court, that the county court had nothing to do with the question whether the justice erred in holding that he had jurisdiction; that, the appeal not being upon questions of law, it did not bring up the testimony taken before the justice; and that the county court had no means of determining whether the accounts proved before the justice exceeded \$400; and further, that the appeal brought up the issues of fact joined in the court below, to be tried anew in the county court, and that the jurisdiction of that court, for all purposes of the trial and judgment, was the same as if the action had been commenced in that court originally. The respondent's counsel claims that this is not an authority against him,

Bartlett v. Mugett.

for the reason that the question of jurisdiction was not raised in that case in the justice's court, and for that reason cannot be considered in the appellate court. There is nothing in this contention, for, if the justice did not have jurisdiction, the consent of the parties would not have given it to him. *Oakley v. Aspinwall*, 3 *N. Y.*, 552; *Plank-Road Co. v. Parker*, 22 *Barb.* 323.

The case of *Kirk v. Blashfield* (6 T. & C. 509), is not an authority to the contrary. There the justice dismissed the action upon the same ground as in the case at bar, but no appeal was taken from his judgment. The plaintiff commenced a new action in the Supreme Court, and recovering less than \$50, he demanded and was allowed full costs; the court holding that the justice's judgment, not having been reversed, was conclusive upon the question of the jurisdiction of the parties.

We think the county court was in error in granting the order appealed from. It should be reversed, with \$10 costs and disbursements of the appeal.

DWIGHT, P. J., HAIGHT and BRADLEY, J. J. concurred.

Lewis v. Empire State Insurance Co.

LEWIS, APPELLANT, v. EMPIRE STATE INSURANCE
COMPANY, RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,
JANUARY, 1894.

§§ 497, 3251.

*Costs—what taxable upon entry of interlocutory judgment overruling
demurrer with leave to plead over.**

Where a demurrer to a complaint is sustained with leave to the defendant to answer over on payment of costs, the defendant should be required to pay the cost of such proceedings as by the operation of the order overruling his demurrer will be vacated, and the plaintiff is not entitled to the costs of any proceedings before notice of trial.

Kniering v. Lennon (22 *N. Y. Supp.* 775); *Skinner v. White*, (69 *Hun*, 127); *Edson v. Dillaye*, (8 *How. Pr.* 278); *Phipps v. Van Cott*, (15 *Id.* 110); *Crary v. Norwood*, (5 *Abb. Pr.* 219); *Anonymous* (3 *Sandf.* 756); followed. *Adams v. Ward*, (60 *How. Pr.* 288); distinguished.

(Decided January 18, 1894.)

Appeal by plaintiff from an order of the Monroe County Special Term denying a motion for a new taxation of costs.

The facts appear in the opinion.

John F. Dorthy, for plaintiff, appellant.

S. L. Adler, for defendant, respondent.

LEWIS, J.—The defendant demurred to the plaintiff's complaint upon the ground that it failed to state a

* See to effect that right to costs is absolute *Tallman v. Bernhard*, ante p. 284.

Lewis v. Empire State Insurance Co.

cause of action. The demurrer was overruled, with costs, but with leave to the defendant to withdraw the demurrer and answer over within 20 days upon the payment of costs, and, in case of his failure so to do, plaintiff was at liberty to enter final judgment for the relief demanded in his complaint. Plaintiff presented to the clerk for taxation a full bill of costs, including the items of \$25 before notice of trial, \$1 for serving summons and complaint, and 63 cents for the sheriff's fees on execution. These items mentioned the clerk refused to tax, and the plaintiff moved the special term for an order directing the clerk to tax said items. His motion was denied, and, from the order denying the motion, plaintiff appealed to this court.

It was an interlocutory judgment the plaintiff was to enter upon the decision overruling the defendant's demurrer. The \$25 costs before notice of trial he will be entitled to tax when he comes to enter his final judgment. The \$25 before notice of trial is for preparing the complaint. The complaint being held to be good, it is not necessary to redraw it. The defendant should be required to pay the costs of such proceedings as by the operation of the order overruling his demurrer will be vacated. The plaintiff was obliged to prepare for the argument of the demurrer; therefore, he was entitled to costs after notice and before trial; but nothing that he had done before noticing the case for trial was in any way vacated by the judgment overruling the demurrer.

The weight of authority seems to sustain this rule. *Kniering v. Lennon*, 22 *N. Y. Supp.* 775; *Skinner v. White*, 69 *Hun.* 127, *Edson v. Dillaye*, 8 *How. Pr.* 273; *Phipps v. Van Cott*, 15 *How. Pr.* 110; *Crary v. Norwood*, 5 *Abb. Pr.* 219; *Anon.*, 3 *Sandf.* 756.*

In *Adams v. Ward*, 60 *How. Pr.* 288, the plaintiff demurred to the answer. His demurrer was sustained, and it was very properly held that he was entitled to costs

* See also, *Thompson v. Stanley*, *N. Y. Civ. Pro.* 348.

Anderson v. Porter.

before notice of trial, as compensation for drawing the pleading.

The order appealed from should be affirmed, with \$10 costs and disbursements of the appeal.

DWIGHT, P. J., and HAIGHT, J., concurred.

ANDERSON v. PORTER.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,
FEBRUARY, 1894.

§§ 382 sub'd 7; 1377 sub'd 2; 3017; 3020.

*Limitations to action—fact that action on judgment of District Court is barred, does not prevent issuance of execution thereon.**

Although an action on a judgment of a district court in the city of New York is barred by the expiration of six years since its recovery, the right to enforce it by execution still subsists in all its plenitude. The enforcement of a judgment by execution is not the legal equivalent of an action upon it.

Waltermire v. Westover (14 *N. Y.* 16); *Johnson v. Albany, etc. R. R. Co.* (54 *N. Y.* 416); *Kincaid v. Richardson* 25 *Hun*, 237; *Rose v. Henry* (37 *Id.* 897); *Townsend v. Tolhurst* 19 *N. Y. Civ. Pro.* 1); *Herder v. Collyer* (23 *Abb. N. C.* 461); *Olten v. Bubbling* (4 *Law Bull.* 68) followed. *Herman v. Stalp.* (17 *N. Y. Civ. Pro.* 338); *Dieffenbach v. Roch* (112 *N. Y.* 651, S. C. 16 *N. Y. Civ. Pro.* 172) distinguished.

A judgment of a District Court in the city of New York is a judgment of the court of common pleas for all the purposes of enforcement by execution.

Townsend v. Tolhurst (19 *N. Y. Civ. Pro.* 1); *Baldwin v. Roberts* (30 *Hun*, 168); *Lyon v. Manly* (10 *Abb. Pr. In re Gates Estate* (21 *N. Y. Supp.* 576) followed; *Matter of Phelps* (6 *Misc.* 397) not followed. *Dieffenbach v. Roch* (112 *N. Y.* 651; S. C. 16 *N. Y. Civ. Pro.* 172) distinguished.

(Decided February, 1894.)

*See note on the effect of the expiration of the period limited for commencing an action upon other remedies, 19 *N. Y. Civ. Pro.* 15.

Anderson v. Porter.

Motion by plaintiff for leave to issue an execution against the defendant's property upon a judgment of a district court in the city of New York.

Isaac L. Miller, for plaintiff and motion.

George D. Beattys, for defendant opposed.

PRYOR, J.—On the 3d of December, 1886, the plaintiff recovered a judgment in a District court of this city and on the same day duly filed a transcript in the office of the County Clerk. Five years having elapsed since entry of the judgment, the plaintiff applies, under section 1377, sub. 2, Code of Civil Procedure, for leave to issue execution upon it: and the motion is resisted on the ground that by section 382, sub. 7, Code of Civil Procedure, an action on the judgment is barred by the expiration of six years since its rendition.

It is obvious, however, that the enforcement of a judgment by execution is not the legal equivalent of an action upon it; and that though the remedy by suit be extinct, the right survives and may be made fruitful by the realization of liens and securities. Hence, while by operation of the statute of limitations the creditor loses the right of action on his judgment, his right to enforce it by execution still subsists in all its plenitude (*Waltermire v. Westover*, 14 *N. Y.*, 16; *Johnson v. Albany, &c., RR. Co.*, 54 *N. Y.*, 416, 424; *Kincaid v. Richardson*, 25 *Hun*, 237; *Rose v. Henry*, 37 *Hun*, 397; *Townsend v. Tolhurst*, 10 *N. Y. Civ. Pro.* 1, *Suppl.*, 378; *Herder v. Collyer*, 22 *Abb. N. C.* 461, 513; *Otten v. Bubbling*, 4 *Law Bull.*, 63.)*

The learned counsel for the defendant urges that the adjudication in *Waltermire v. Westover*, proceeded on the

*See also to like effect *Bolt v. Hauser*, 19 *N. Y. Civ. Pro.* 7, *aff'd* 19 *Id.* 210; *Green v. Hauser*, 18 *Id.* 354.

Anderson v. Porter.

peculiar phraseology of an obsolete statute, and so is of no authority on the point in dispute. But, he is mistaken; the express *ratio decidendi* in the opinion of the Court is the distinction between right and remedy, and the effect of the statute of limitations in barring an action merely, without otherwise impairing the efficacy of the judgment.

Even if this be so, still counsel contends that the doctrine of *Waltermire v. Westover* is superseded by the later adjudication in *Dieffenbach v. Roch* (112 *N. Y.* 651. S. C. 16 *N. Y. Civ. Pro.* 172), but, obviously in that case the question here involved was not agitated; nor "did that case in the slightest degree impair the decision in *Waltermire v. Westover*" (Macomber, J., in *Townsend v. Tolhurst*, 19 *N. Y. Civ. Pro.* 1).

Herman v. Stalp, though not an adjudication of the question in controversy, propounds a dictum favorable to the defendant's contention; but, as the conclusion of the learned Judge is deduced from the assumption that a judgment incapable of supporting an action is ineffectual for an execution, and as he himself had expressly ruled the contrary, the previous term (*Herder v. Collyer* 6 *Supp.*, 513), I may, with all respect for his recognized ability, yield my assent to what appears to be the better reason and the weightier authority.

The defendant, again, opposes the application upon the ground that the judgment on which it is sought to issue execution is not, in fact, a judgment of the Court of Common Pleas. What of it? The judgment is "deemed" a judgment of the Court of Common Pleas and may be enforced accordingly by an execution issued by the County Clerk and directed to the Sheriff (Code, secs. 3017, 3220). *Dieffenbach v. Roch*, (112 *N. Y.* 621, S. C. 16 *N. Y. Civ. Pro.* 172), merely decides that the judgment of a Justice docketed in the County Clerk's office is not a judgment "rendered" in the County Court within subdivision 7 of section 382 of the Code; but that such a judgment so

Schell v. Lowe.

docketed is a judgment of the County Court for all the purposes of enforcement by execution is plain upon the terms of the statute and is settled by authoritative adjudication (*Townsend v. Tolhurst*, 19 *N. Y. Civ. Pro.* 1; *Baldwin v. Roberts*, 30 *Hun*, 163; *Lyon v. Manly*, 10 *Abb.*, 337; *In re Gate's Estate*, 21 *Suppl.*, 576, and cases *supra*).*

Matter of Phelps (6 *Misc.*, 397) is apparently *contra*; but the argument of the opinion is too artificial and inconclusive to satisfy the understanding.

The judgment being still alive and operative, and the statute of limitations opposing no obstacle to its enforcement by execution, the manifest dictate of justice is that the plaintiff should have the only process available to him for the satisfaction of his debt.

Application granted with costs.

SCHELL, APPELLANT, v. LOWE, RESPONDENT, CLARKE
AND ANOTHER, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM.
JANUARY, 1894.

§ 820.

Interpleader—affidavit need not express doubt as to who has just claim.

An affidavit upon which a motion is made under section 820 of the Code of Civil Procedure for an order directing interpleader, need not allege that the moving party is in doubt as to who has the just claim.

Bowery Natl. Bank v. Mayor, (4 *N. Y. St. Rep.* 565); *Pratt v. Myers*, (18 *N. Y. Supp.* 466); *Barnes v. Mayor*, (37 *Hun*, 386); *Dreyfus v. Casey*, 52 *Hun*, 95) followed. *Nassau Bank v. Yandes*, (44 *Hun*, 55); *Mars. v. Albany Savings Bank*, (64 *Hun*, 424) distinguished. *Williams v. Aetna Life Ins. Co.*, (8 *N. Y. St. Rep.* 567, not followed. (*Decided January 12, 1894.*)

*See also *Davidson v. Horn*, 47 *Hun*, 51.

Schell v. Lowe.

Appeal by plaintiff from an order of the New York County Special Term allowing the defendant, Lowe, to deposit in court the sum claimed in the complaint in this action, and substituting as defendants in this action William J. and George B. Clarke and discharging the defendant Lowe from liability to the plaintiff or said substituted defendants.

The opinion states the facts.

Daniel G. Rollins and William Mitchell (Mitchell & Mitchell, Attorneys) for plaintiff, appellant.

Andrew Wilson and Wales F. Severance, for defendant, respondent.

PARKER, J.—An action was brought to recover from the defendant James Lowe \$3,000 for rent of certain premises leased by him from Richard J. Clarke and Caroline Clarke, May 1, 1891. The term of the lease is five years, and the rental \$3,000 per annum, payable monthly in advance. Richard J. Clarke died June 10, 1892. During the month of October following, William J. Clarke and George B. Clarke commenced an action, claiming that Richard J. Clarke died intestate, seized of the premises in question; that they were his heirs; and demanded judgment for the possession of the premises, for an accounting of the rent, and for damages. Lowe answered, denying knowledge or information sufficient to form a belief as to the rights of the respective parties; alleging the making of the lease, and his possession thereunder; offering to pay the rent into court or otherwise, as ordered. A contest was then pending over an alleged will of Richard J. Clarke, but subsequently, and on April 24, 1893, it was admitted to probate. The next day, however, proceedings for revocation of probate were insti-

Schell v. Lowe.

tuted by William J. Clarke and George B. Clarke, which were undetermined at the time this motion was made.

June 17, 1893, this plaintiff, Alice A. Schell, claiming as devisee under such will, and as assignee of Caroline Clarke, commenced this action to recover the rent of the premises from July 1, 1892, to July 1, 1893.

Thereupon this motion was made, the defendant Lowe stating in his affidavit, which formed a part of the moving papers, among other things, that he had no interest in the result of the claim of either of the parties, and that the claim of either had not been made through any collusion with him.

The court determined that defendant was entitled, under section 820 of the Code of Civil Procedure, to have William J. and George B. Clarke brought in as defendants, and be discharged from all liability to either plaintiff or the Clarks on payment into court of the sum claimed in the complaint.

Appellant contends that the order thus made cannot be sustained, because the affidavit of the moving party does not allege that he is in doubt as to who has the just claim. In other words, her contention is that it is not sufficient to put the court in possession of the facts, leaving it to determine whether they require the granting of the relief asked for; but that, in addition, the moving party must express an opinion touching the merits of the claim asserted by the respective parties.

It is difficult to see how such an expression of opinion could be of aid to a court in reaching a conclusion, which must necessarily be founded upon facts. Certainly there is nothing in the section authorizing the court to interplead other parties requiring that a moving party shall give expression either to his opinions or doubts. But it is said that the discretion committed to the court is a judicial one, and therefore to be exercised in accord with the rules which the courts have from time to time, by de-

Schell v. Lowe.

cision, established; that one of the rules, so firmly grounded as not to admit of further questioning, requires a statement on the part of the moving party to the effect that there is a real doubt in his mind, based upon facts, as to which one of the claimants has a just claim.

It has been uniformly held that the remedy authorized by section 820 of the Code is a substitute for the old action of interpleader, and governed by the same principle. The facts essential to the maintenance of such a suit were that two or more persons have a claim against the complainant; that they claim the same thing; that the complainant has no beneficial interest in the thing claimed; that he cannot determine without hazard to himself to which of such persons the thing belongs; that there is no collusion between him and any of the parties; and that he will bring the money or thing claimed into court. *Crane v. McDonald*, 118 *N. Y.* 648. Now, all of these facts appear. It is true that he does not state that he cannot determine without hazard to himself to which of the persons claiming it the money belongs; but, if he did, it would merely be an expression of his opinion, not a fact. The facts were fully stated and it was for the court to say whether the defendant would incur such risk, in determining which of the parties he should pay, as devolved upon it the duty of exercising the discretion committed to it in his favor.

The decision of the court at special term is fully within and authorized by *Bowery Nat. Bank v. Mayor*, 4 *N. Y. St. Rep.* 565; *Pratt v. Myers*, 18 *N. Y. Supp.* 466; *Barnes v. Mayor*, 27 *Hun*, 236; *Dreyfus v. Casey*, 52 *Hun*, 95.

It is not in conflict with *Nassau Bank v. Yandes*, 44 *Hun*, 55. It was not held in that case that a moving party should manifest by appropriate language that he had doubts as to which of the claimants urging upon him the payment of money, which he ought not to pay but

Schell v. Lowe.

once, would ultimately be successful, but that the facts upon which a moving party bases his claim for the order of interpleader should be such as to satisfy the court, that there was a reasonable doubt as to whether he would be reasonably safe in paying over the money to one of the claimants.

So in *Mars v. Albany Sav'g Bank*, 64 *Hun*, 424, the point of the decision was that the facts stated by the moving party were insufficient to support an order of interpleader, because they failed to establish that there was some foundation for the rival claim, or some plausibility in it. It is true that the court quoted from the opinion in *Williams v. Aetna Life Ins. Co.*, 8 *N. Y. St. Rep.* 567, the following: "There must always be a real doubt in the mind of the defendant, based upon facts, as to who has the just claim, before an interpleader should be permitted, or the provisions of the Code (§ 820) enforced."

So far as I have observed, the case thus quoted from is the only one in which a court has said that the failure of a party to express his opinion touching the claims of success likely to attend the efforts of either of the contending parties should be treated as a fact, to be weighed by the court in connection with actual facts, in determining whether he is entitled to the relief which the Code undertakes to provide for those meriting it. It is not unlikely that through inadvertence the word "defendant" was used where "court" was intended. Had it been so written, it would have more nearly harmonized with several other decisions. But, while it was quoted in *Mars' Case*, *supra*, it was not necessary for the decision in that case, because the point was not involved. It was made use of, doubtless, with the view that it tended to support the determination made that it must appear from the facts presented in support of the motion that the claim of a person sought to be substituted as a party defendant was not frivolous, but plausible, and such as to

create a reasonable doubt touching its validity. Subsequently, and in the same case, (69 *Hun*, 398), that court reaffirmed the position thus taken.

Now, the facts presented on the motion clearly brought Lowe within the protection of the rule laid down in *Bank v. Yandes* and *Mars v. Bank*, *supra*. Without collusion on his part he had been made a party defendant in an action wherein it was claimed that his lessor had died intestate as to these premises, by reason of which the plaintiff, as his heir at law, demanded the rents. As further evidence of the plausibility of the plaintiff's claim the fact was made to appear that, in pursuance of the statute authorizing proceedings for revocation of probate, the plaintiffs were then contesting the validity of the will before the surrogate; and it was as devisee under that will that the plaintiff in this action claims the right to recover the rent which Lowe in his lease had promised to pay his lessor, Richard J. Clarke. From these facts it is apparent that the court could not have held otherwise than that a reasonable doubt was presented as to which one of the claimants would ultimately be adjudged to be entitled to the rent.

Indeed, it is not conceivable what other facts could have been shown, except the evidence upon which the contestants were relying to attack the validity of the alleged will. No case has gone so far as to hold that it is necessary to produce such evidence on motion for interpleader. To take such a step would be to practically deny the relief which section 820 was intended to afford, for it would burden a party seeking its aid with the annoyance and expense which the section was intended to authorize courts to shield him from.

The order should be affirmed, with \$10 costs and printing disbursements.

Garson v. Brumberg.

GARSON, *et al*, RESPONDENTS, *v.* BRUMBERG,
KORNHAUSER, APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,
JANUARY, 1894.

§§ 636, 641.

Attachment—when recital in, of grounds of, sufficient.

An attachment stating as the grounds upon which it is issued that the "defendant did on or about the 20th July, 1893, being a natural person, and resident of this state depart from this state with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent," sufficiently states the grounds of the attachment. The statement of the grounds in such case in the alternative is proper.

Dintruff v. Tuthill (62 *Hun*, 591); *MacDonald v. Kleperdorp* (22 *N. Y. Civ. Pro.* 105); *Johnson v. Buckel* (20 *N. Y. Supp.* 566); *First Nat. Bank v. Bushwick Chem. Works*, (17 *N. Y. Civ. Pro.* 239) distinguished. *Van Alstyne v. Erwine*, (11 *N. Y.* 339) followed.

Decided January 18, 1894.

Appeal by Dewitt Kornhauser, junior judgment creditor of the defendant from an order of the New York County Special term denying a motion made by him to vacate an attachment issued in this action and levied upon property of the judgment debtor.

The opinion states the facts.

Edward L. Jellinek, for appellant.

Wile & Goff, for plaintiff, respondent.

HAIGHT, J.—The motion to vacate the attachment was based on the papers upon which it is granted. The grounds recited in the attachment are that "the said de-

Garson v. Brumberg.

fendant did, on or about the 20th July, 1893, being a natural person, and resident of this state, depart from this state with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent." While the affidavits upon which the attachment was granted are properly subject to some criticism, still we are of the opinion that the facts stated are sufficient to authorize the issuance of the same.

A more serious question arises as to the grounds stated in the attachment, the recital being in the alternative. The warrant of attachment must now briefly recite the grounds upon which it was granted. Code Civ. Pro. § 641. It may be granted where "the defendant is either a foreign corporation, or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent." *Code Civ. Pro.*, § 636, subd. 2.

In *Dintruff v. Tuthill* (62 Hun, 591), it was held that a warrant of attachment which follows the language of the statute, and recites the facts in the alternative, is defective. In that case the recital was to the effect that the defendant "has removed, or is about to remove, the property, of the said firm from the state, with intent to defraud the creditors of the said firm, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, the property of the said firm, with intent to defraud the creditors of the said firm." And to the same effect are *MacDonald v. Kieferdorf*, 22 *N. Y. Civ. Pro.* 105; *Johnson v. Buckel*, 20 *N. Y., Supp.* 566; *First Nat. Bank v. Bushwick Chemi-*

Garson v. Brumberg.

cal Works, 17 *N.Y. Civ. Pro.* 229. But these cases are all under the other clause of the section, and are not necessarily controlling upon the question under consideration. They charge that the defendant has removed, or is about to remove, property from the state, with the intent to defraud his creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with the like intent. The removal of property with the intent to defraud creditors is one ground, and the assignment of it with like intent is another; but they are based upon different facts, and both cannot well be included in or established by the same facts, while, under the other provision of the Code, the intent to defraud creditors or to avoid the service of a summons may be established from the same facts. Whether he has departed from the state or keeps himself concealed therein is immaterial where the purpose and intent is the same. It appears to us that this subdivision of the section may properly receive a construction which allows the grounds to be stated in the attachment in the alternative; otherwise the clause can be of but little benefit, for where the debtor has secreted himself, either by departing from the state or by hiding himself within the state, the creditor, if compelled to establish it, will in most cases be powerless to do so, for reasons which are obvious.

The distinction to which we have alluded is clearly pointed out by *Drake on Attachments*. At section 101 he calls attention to a rule, to the effect that as many grounds may be alleged for the attachment as are within the terms of the law, and may be deemed expedient, but in doing so the several grounds should be stated cumulatively, and not in the disjunctive; and then following, in section 102 he says: "Let it be observed, however, that where the disjunctive 'or' is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact attended with the

results, the construction just mentioned would be inapplicable. For instance, where the statute authorizes an attachment when the defendant absconds or secretes himself, it was considered, from the difficulty of determining which was the fact, that the language comprised but one ground, and the disjunctive 'or' did not render the affidavit uncertain;" referring to *Johnson v. Hale*, 3 *Stew. & P.* 331.

Continuing, he says: "It is often difficult, if not impracticable, for the creditor to ascertain whether his debtor absconds or secretes himself. He has to rely frequently upon such information as his family or friends will give him, which cannot always be confided in. Hence, to allow sufficient latitude to the creditor in making his affidavit, and to prevent failure from having mistaken the cause why the debtor is liable to the remedy, the law has very properly provided for its issuance in the alternative;" referring to *Cannon v. Logan*, 5 *Port. (Ala.)* 77.

Kneeland on Attachment (section 215) says: "Although there is a distinction in words between a concealment and an absconding, there is no difference in fact. The terms are not strictly synonymous, but the one is included in the other. Absconding is not always a concealment, but concealment for the purpose of defrauding creditors or avoiding service of summons is always an absconding. Where both of the terms are used, either separately or conjunctively, the one refers to a concealment or absconding within, and the other without, the state; but the line of demarcation is not drawn so strictly as to affect the jurisdiction of the court. It is not a fatal defect in an affidavit, therefore, to use the term 'absconds or conceals himself,' as but one real ground of attachment is set forth, the terms being for that purpose equivalent. And where it is doubtful whether a debtor has departed from the state or concealed himself therein with the intent to defraud his creditors or avoid service, an attach-

Garson v. Bruab rg.

ment will be granted if the creditor charge in the disjunctive that he has done one or the other."

In *Van Alstyne v. Erwine* (11 *N. Y.*, 331, 339), Denio, J., in considering the grounds upon which an attachment may issue, says: "It is objected that the application is in the disjunctive,—that the debtor had departed from the state, or was concealed within it, with the intent to defraud his creditors; and it is said that the creditor should have stated his case under one or the other aspect, and not in the alternative. The remedy is precisely the same whether the debtor had absconded or was concealed, no difference whatever existing in the proceedings in the two cases. A case may be so circumstanced that, although it may be conclusively shown that the debtor has left his place of residence in order to defraud his creditors by depriving them of their remedies, yet it may be impossible even to conjecture whether he has continued his flight beyond the boundaries of the state, or has resorted to some place of concealment in it. The affidavits disclose such a case in the present instance. If the objection is well founded, there could be no proceeding under this statute in a case thus circumstanced. The debtor would only have so to conduct his evasion as to make it uncertain which course he had adopted, and he would avoid this remedy. I do not think this statute requires such a construction."

See, also, 2 *Wait, Pr.* 137.

It is claimed that these cases have no application, for the reason that the Code now requires the grounds to be stated in the attachment. Formerly, it is true, the grounds were not required to be so stated, but they were required to be shown from the facts set forth in the affidavits upon which the attachment was issued; and if the facts in the affidavit, stated in the alternative, were sufficient under the subdivision of the Code alluded to, we fail to see why they may not be so stated in the attachment.

Knox v. Nobel.

We think the order appealed from should be affirmed, with \$10 costs and disbursements.

DWIGHT, P. J., LEWIS and BRADLEY, J. J., concurred.

KNOX v. NOBEL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY
SPECIAL TERM, JANUARY, 1894.

§ 2660.

Administrator—when appointment of, may be attacked collaterally—effect of infancy—action to disaffirm contract.

The appointment of an infant administrator of an estate is absolutely void, and may be attacked collaterally. Such appointment does not become effectual upon the infant's reaching his majority. Where the plaintiff in an action induced by fraud so to do while an infant, made a contract by which she assumed to act as administrator of an estate of which she was not administrator and received, upon the execution of that contract, a sum of money from the defendant,—Held, that after her arrival of age, she had a cause of action as an individual to have that contract declared to be invalid both on account of infancy at the time it was made, and because she was induced to execute it by fraud.

(Decided January 8, 1894).

Demurrer by defendant to complaint. The opinion states the facts.

Henry Kropf, for defendant and demurrer.

Lucien Birdseye (*Birdseye, Cloyd & Baylin*, Attorneys) for plaintiff opposed.

Knox v. Nobel.

INGRAHAM, J.—The defendant demurs to the complaint upon two grounds: (1) That the plaintiff has not the legal capacity to sue, in that the cause of action alleged in the complaint, if any, is vested in and belongs to the personal representative of Henry Niesterman, deceased; (2) that the complaint does not state facts sufficient to constitute a cause of action.

The objection that there is a defect of parties defendant is not taken; and, if such defect exists, it is waived. *Code Civ. Pro.* § 499. The question to be determined on this demurrer, therefore, is whether or not the complaint alleges facts sufficient to constitute a cause of action in favor of this plaintiff, individually, against the defendant.

The complaint alleges, in substance, the following facts: That the plaintiff was the widow of Niesterman, who died several years ago; that, at the time she was an infant, she applied for and obtained letters of administration upon his estate, and as such administratrix executed an instrument which transferred to the defendant all of the interest of her husband, whose administratrix she claimed to be, in and to a certain business which had prior to his death, been conducted by the husband of the plaintiff and the defendant as co-partners. The plaintiff alleges such infancy; alleges facts tending to show that fraud had been committed upon the plaintiff, by which she was induced to execute such agreement; alleges the invalidity of the agreement by reason of her infancy at the time, and also because of the fraud complained of; and asked to have the agreement rescinded. The question is whether or not the letters of administration issued by the surrogate to the plaintiff when she was an infant conferred any authority upon the plaintiff to act as administratrix; in other words, whether or not such letters were actually void when they attempted to constitute a person who was incapable of becoming an administrator such administrator.

The defendant claims that, the surrogate having, by the granting of the letters to the plaintiff, adjudicated all of the facts necessary to sustain the granting of such letters, such adjudication is conclusive, not only as to the fact that he was required to determine,—as to whether or not he would grant letters upon the estate of the deceased,—but also as to the competency of the person appointed administrator to act, and that such decision cannot be attacked collaterally.

This principle is now well established in this state, so far as applies to any fact that was necessary to be adjudicated upon by the surrogate after he had acquired jurisdiction of the parties to the proceeding and of the subject-matter, and I think, clearly, it applies, so far as it affects the relationship of the proposed administrator, and his right under the statute to receive letters. That, however, is not the question here. It is whether or not a person who was deemed by the law incapable of action or making any contract can be, by a decree of the surrogate, clothed with full power to act.

Suppose, for example, that the surrogate had issued letters to a person who had died before the letters were issued, but whose death was unknown to the surrogate; could it be claimed for a moment that any letters of administration upon the estate had been granted? Or suppose that the surrogate had issued letters constituting a person judicially declared to be insane administrator of an estate; could it be claimed that those letters were valid, and that the estate was bound by any act of the lunatic, because he was acting as executor or administrator? And in what respect does the power of an infant to act, either individually or in a representative capacity, differ from that of a person judicially declared a lunatic.

It is a general principle that offices where judgement, discretion, and experience are essentially necessary to the proper discharge of the duties they impose—offices of

Knox v. Nobel.

pecuniary and public responsibility—cannot be held by infants; so, an infant cannot be appointed an administrator or an executor. See 10 *Amer. & Eng. Enc. Law*, p. 615, and cases there cited.

The case of *Carow v. Mowatt* (2 *Edw. Ch.* 58) was a case where the widow, who was an infant, was appointed administratrix of her deceased husband's estate; and the vice chancellor seemed to assume that the appointment was void, saying: "The appointment may, from personal disability, have been irregular and void; but after such disability is removed, if he will continue to hold the office and act in the trust, a court of equity, regarding him as trustee, will compel him to account for his receipts after the time of arriving at full age, although no account will be directed in respect to the assets which came to his hands during infancy," citing *Hindmarsh v. Southgate*, 3 *Russ.* 324.

It would seem to me that the appointment of an infant is absolutely void, not because of any defect in the proceedings by which the appointment was made, or the absence of any facts that the surrogate was required to determine to justify the issuing of letters, but because the person designated to act as administrator was incapable by law from acting. His act would not bind him individually, and therefore cannot be held to bind the estate. He could not be compelled to account for money that came into his hands during infancy (*Carow v. Mowatt, supra*;) and it would seem to me to follow that, the granting of letters being void when granted, in order to constitute the person administratrix, a new appointment was necessary after the disability had been removed; and that would follow from the ground upon which the vice-chancellor, in the case above cited, placed the liability of the person appointed administrator for moneys received by him after he became of age. It was not that he was liable as administrator, but because the court of equity would fas-

Knox v. Nobel.

ten a trust upon him for the moneys that he had received when he was of age, where he assumed to act as administrator without authority. See, also *Hindmarsh v. Southgate*, 3 *Russ.* 326.

I think, therefore, in this case, that no valid letters of administration were issued upon the estate of the deceased, and, so far as appears, there is now no legally appointed administrator of this estate. That being so, what is the condition of the parties? The plaintiff, while an infant, made a contract by which she assumed to act as administrator of an estate of which she was not such administrator, and received, upon the execution of that contract, a sum of money from the defendant. I think it clear that had she been an adult, and capable of making a valid contract, and had assumed to act as executor without authority, she would have been personally liable for any injury that the person with whom she contracted sustained by reason of her want of authority; so that, but for her infancy, she would be individually liable to the defendant in case the contract that she attempted to make as administrator was illegal because of her want of authority to act. Such being the case, upon her arrival of age, or within a reasonable time thereafter, she was bound to disaffirm that contract; and she now individually comes into court and asks that that contract be declared invalid, both on account of infancy at the time it was made, and because she was induced to execute it by fraud.

It seems to me that she has a cause of action, as an individual, to have that contract declared to be invalid.

The estate has no interest in the question whether or not she (the plaintiff), as an individual, is liable to the defendant for any damage sustained by him because she was not what she pretended to be, namely, the administratrix of that estate.

Upon the death of one of the partners, the property of the partnership vested in the surviving partner. The

Knox v. Nobel

personal representative of the deceased partner did not become the owner of any portion of the copartnership property. He had a right to apply to a court of equity to compel the surviving partner to account for the property that came into his hands, and to pay such representative the share of the deceased partner after the payment of debts. Such relief cannot be obtained in this action, because the personal representatives of the deceased are not parties to the action; but there is, I think, as before stated, a good cause of action in the plaintiff when she asks the court to adjudge that this contract which she made, by which she attempted to act as administrator of the estate, but which was void, as such administrator, because she was not the legally appointed administrator, be declared void as to her individually, and to impose no obligation or liability upon her. *

I think, therefore, that the demurrer, must be overruled, and judgment ordered for the plaintiff, with costs, with leave to the defendant to withdraw the demurrer, and answer over within twenty days, upon payment of costs.

* The cases in which a court of equity can afford relief by the rescission, cancellation or delivering of agreements, securities or deeds are stated in *Willard's Equity Jurisprudence (Potter's Edition)*, p. 308 *et seq.*, and it is there stated (p. 304) that rescission "includes the equitable rights of a party to a contract to declare or have the contract declared amended and made void . . . by a decree of a court of equity, . . . by reason of some fraud or fraudulent representation which entered into the consideration of the contract."

Krauss v. Hallbelmer.

KRAUSS v. HALLBEIMER, *et al.*,SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
MAY, 1893.

§§ 4, 891.

Commission—Settlement of interrogatories.

Where interrogatories to be annexed to a commission are to be settled, the proper practice where they are not settled by consent and the order directing the issuance of the commission does not prescribe some mode, is to serve a copy of the proposed interrogatories on the opposite attorney with a notice of four days of the time and place at which they will be presented for settlement; the opposite party may propose cross-interrogatories, a copy of which must be served two days before the settlement of the interrogatories, accompanied by a notice that they will be presented at the same time the interrogatories are noticed for settlement.

(Decided May 22, 1893.)

Motion by plaintiff for an order directing the defendant to forthwith serve cross-interrogatories to be annexed to a commission to be issued herein to take the testimony of a witness without the State.

George Carlton Comstock, for plaintiff and motion.

J. Stewart Ross, for defendant, opposed.

MCADAM J.—The practice in regard to the settlement of interrogatories has long since been settled. The Code (§ 891) provides that “unless the interrogatories to be annexed to the commission are settled by consent of the parties, they must be settled upon notice * * * as prescribed by the general rules of practice.”

Krauss v. Hallbeimer.

As these rules make no allusion to the subject, the matter is by force of section 4 of the Code, left to be regulated by the then pre-existing "course and practice of the Courts," which will be found in the several books on practice, as follows: "To procure the settlement, serve a copy of the proposed interrogatories on the opposite attorney with a notice of four days of the time and place at which they will be presented for settlement. The opposite party may propose cross-interrogatories, a copy of which must be served two days before the settlement of the interrogatories" (1 Van Santvoord's Eq. Pr., 2d ed., 289; Graham's Pr., 2d ed., 596; 2 Tillinghast & Shear Pr., 392). The cross-interrogatories should be accompanied by a notice that they will be presented at the same time the interrogatories are noticed for settlement (1 Burr. Pr. 444).

Unless the order directing the commission prescribes some other mode, the practice stated must be pursued.

The plaintiff who seems to be in a hurry to send off the commission has already lost six days' time by failing to observe the rule declared. He may re-serve his interrogatories with the required notice of settlement, and the defendant must (if he intends to join in the commission) comply with the practice as to cross-interrogatories or lose the benefit thereof.

The motion to compel the defendant to forthwith serve his cross-interrogatories being unauthorized must be denied, with \$10 costs to abide the event.

BAILEY v. SARGENT GRANITE CO.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM,
APRIL, 1893.

§ 416.

*Summons—copy served controls—effect of mistake in papers as to court in
which action pending.*

Where the original summons in an action was entitled in the "N. Y. Superior Court," and the copy served was entitled in the "N. Y. Common Pleas" Court—*Held*, that the action was effectually commenced in the Court of Common Pleas and was there pending; that the plaintiff was bound by the process served, and the fact that some of the subsequent papers served by the plaintiff were entitled in the Superior Court, did not alter the fact that the action was pending in another court.

A defect in a copy of a paper is not cured by showing that the original is correct.

A party may always treat a paper served upon him as a true copy of the original and act accordingly.

(*Decided April 8, 1893.*)

Motion by plaintiff to declare this action to be an action pending in this court or to consolidate it with one pending in the N. Y. Court of Common Pleas.

The copy summons by which this action was commenced was entitled in the "N. Y. Common Pleas," but the original summons was entitled in the "N. Y. Superior Court." Thereafter other papers were served by plaintiff in the action, some entitled in the N. Y. Superior Court, and others in the Court of Common Pleas. The plaintiff upon discovering the mistakes that had been made in naming the court made this motion.

Bailey v. Sargent Granite Co.

George Carlton Comstock, for plaintiff and motion.

Harriman & Fessenden, for defendant, opposed.

MCADAM, J.—A civil action is commenced by the service of a summons (*Code, Civ. Pro.*, § 416). The summons served was entitled in the "N. Y. Common Pleas," and the action was thereby effectually commenced in that Court, and is pending there now. The fact that the original summons was entitled in the "N. Y. Superior Court," is of no consequence as the plaintiff is bound by the process served (2 *Wail's Pr.*, 302; 4 *Duer*, 448).

A defect in the copy is not cured by showing that the original was correct (*Id.*) A party may always treat a paper served upon him as a true copy of the original, and act accordingly.

The fact that some of the subsequent papers were served by the plaintiff's attorney, entitled in this Court, does not alter the fact that the action is pending in another Court. (4 *Sandf.*, 641).

Motion to declare the action pending in this Court or to consolidate, denied, without costs.

A discontinuance here is unnecessary as this Court has no jurisdiction in the premises, and technically speaking, nothing to do with the action.

Hay v. Muller.

**HAY, RESPONDENT, v. MULLER AS EXECUTRIX, ETC.,
APPELLANT.**

**N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, APRIL,
1894.**

§§ 829, 1726, 1730.

*Action to recover chattel—effect of failure to prove value—Charge to jury
—Appeal.*

The court of common pleas cannot review the evidence upon an appeal from the general term of the city court of New York, either where there was an affirmance below or where the appeal is taken only from a judgment, and not from an order denying a new trial, but it may look into the record to ascertain whether any essential fact is substantially without proof, if that point has been raised by a sufficiently specific objection.

Proof that chattels to recover which an action was brought are of some value, is sufficient to sustain the action, although their value is not proven.

In an action to recover a chattel the plaintiff may have judgment, although there is not any evidence of value, and where the jury has not found the value of the property, the plaintiff if he will, may take judgment for possession only.

In an action for replevin where there is some proof of value the plaintiff is entitled to judgment for possession, and it is not error to deny a motion to dismiss for defective proof of value.

Hammond v. Morgan (101 N. Y. 179), followed. *Button v. Chapin* (7 N. Y. Civ. Pro. 278), distinguished.

Where the Court cannot charge one proposition of a request it is not error to refuse all.

Whether there is evidence for the jury is a question of law for the Court to determine, and therefore, in an action of replevin, a request that the Court charge "that in the event the jury find there is no evidence as to the value sufficient for them to consider they may find a verdict for only six cents" is properly refused.

Where evidence was improperly received the error is repaired by commutative testimony to the fact.

Testimony by the plaintiff in an action to the effect that he delivered property, the subject of the action, at the "establishment" of the defendants testator, is testimony to a personal transaction with the decedent and improperly admitted.

Hay v. Muller.

Gregory v. Fichtner (21 N. Y. Civ. Pro. 1), followed.

Where an action involving a simple issue of fact and a trifling sum of money, had been twice tried and each time the verdict was for the plaintiff,—*Held*, that a judgment in favor of the plaintiff would not be reversed for errors in admitting evidence where the effect of the error was not seriously injurious to the defeated party.

(Decided April 2, 1894.)

Appeal by the defendant from a judgment in favor of the plaintiff entered upon a verdict of a jury.

The facts appear in the opinion.

John A. Straley, for defendant, appellants.

Paul Wilcox, for plaintiff, respondent.

PRYOR, J.—In replevin in the city court for five lithographic stones, the plaintiff had judgment for the possession, or else the value of the property. Upon two grounds, each in itself sufficient, we are unable to review the evidence on the trial; first, because of the affirmance below; and, secondly, because, by its true construction, the appeal is from the judgment only, and not also from the order denying a new trial.

Still, we may look into the record to ascertain whether any essential fact be substantially without proof, provided the appellant has raised the point by a sufficiently specific objection. This she has done. By motion to dismiss the complaint, she presents the point that no evidence was given of the value of the stones. But the position is obviously untenable. Upon the proofs, it is clear to demonstration that the stones were of some value, and that was enough to sustain the action.

But, suppose no evidence of value, still judgment for the plaintiff would not be defeated. True, the Code requires

Hay v. Muller.

(§ 1730)* that where, as here, the chattel was not replevied, "the judgment must award to the plaintiff the sum fixed as the value thereof." But this provision is manifestly for the benefit of a plaintiff only, to the end that, should execution fail to bring him possession of the chattel, he may be indemnified by payment of its value. Plainly, a defendant is not prejudiced by omission of the award from the judgment, and so is not aggrieved by the absence of evidence of value. Hence, although the jury have not found the value of the property, a plaintiff, if he will, may take judgment for possession merely. *Hammond v. Morgan* 101 N. Y. 179.

Button v. Chapin, 7 Civ. Pro. 278, decides nothing to the contrary, but only that, when the value is awarded by the judgment, it must be the value at the time of the trial, and not at the date of the demand. As some value was shown, and as plaintiff was entitled to judgment for possession at all events, it was not error to deny the motion to dismiss for defect of proof of value.

Besides the motion to dismiss, the defendant requested a charge as follows: "That there is no evidence of value proved in this case; and that, in the event of the jury finding for the plaintiff, the verdict must be for the return or for six cents damages." Now, there was evidence of value; and, as the court could not charge one proposition of the request, it was not error to refuse all. Eliminating, however, the faulty clause, and still the request was not allowable. If successful, the plaintiff was entitled to judgment of

* See also Section 1726 of the Code of Civil Procedure which is as follows: "The verdict, report, or decision must fix the damages, if any, of the prevailing party. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the sheriff to the unsuccessful party, or to a person not a party, it must also, except in a case specified in the next section, fix the value of the chattel, at the time of the trial."

Hay v. Muller.

possession, with damages; not in the alternative for possession or damages. *Code Civ. Pro.*, § 1730.

Still another request was "that, in the event the jury find there is no evidence as to the value sufficient for them to consider, they should find a verdict for only six cents." It is apparent already that there was evidence of value for consideration by the jury, and they were not authorized to find the contrary. Again, whether there be evidence for the jury is, by fundamental principle, a question of law for the court. *Nelson v. Railroad Co.*, (herewith decided) 28 *N. Y. Supp.* 50. This part of the request, being inadmissible, vitiates the whole. and the whole was rightly refused.

A more perplexing problem than any hitherto discussed is presented by an objection to evidence. The answer, in due form, challenged the fact that defendant ever had possession of the chattel; and to prove it, the plaintiff himself testified that he delivered it "to Gustav Muller's establishment, No. 62 Duane Street." As the question did not apparently call for this response, the defendant was not amiss in allowing it. But, when the answer was given, she moved to strike it out, "upon the ground that it shows a personal transaction between the witness and the deceased Gustav Muller." To a denial of the motion, exception was taken; and the question is whether the evidence be incompetent under section 829 of the Code. Was the answer a disclosure of a personal transaction between the witness (plaintiff) and the decedent defendant's testator? That it was is thought to be settled by our decision in *Gregory v. Fichtner*, 21 *N. Y. Civ. Pro.* 1. That was a border case, and its authority is not to be extended a hair's breadth beyond the precise predicament of fact there presented. The action was trover for a parcel of jewelry; and, to identify the articles converted, the plaintiff testified that she delivered them to the decedent in a box, through the instrumentality

Hay v. Muller.

of a third person, ignorant of the contents of the box. We held that, in effect, the delivery was by the plaintiff to the deceased, and so was a personal transaction. That this action is against the executrix does not differ the case, for so it was in *Gregory v. Fichtner*. If the cases are distinguishable, it is by a line, almost, if not altogether too faint and too fine for judicial discrimination. Here the chattels were delivered by the plaintiff at the "establishment" of the deceased,—not to him personally,—and they came into his possession by the agency of others. Assuming the evidence to be within the scope of our previous adjudication, and so wrongfully received, the error was repaired by cumulative testimony to the fact. *Olcott v. Kohlsaat*, 8 *N. Y. Supp.* 116. Another witness swore positively to the possession of the sotsnes by the deceased; and his son said, "We returned them." True, he denied it; but nevertheless the jury may have believed the alleged admission.

We should not be justified for reversing the judgment for error, if error there was, in receiving the evidence. "Although the ruling is undoubtedly subject to criticism, its effect can hardly have been seriously injurious to the plaintiff; certainly not harmful enough to warrant a reversal. We think there ought not to be any more trials of this action. It involves simple issues of fact, which two out of three judges have decided, in favor of the defendant. No substantial error is shown to have occurred upon the last trial, and the judgment should be affirmed. *Yeandle v. Yeandle*, 16 *N. Y. Supp.*, 49. So here, the action involves simple issue of fact and a trifling sum of money; it has been tried twice, and each time the verdict was for the plaintiff. We are of the opinion that the litigation should cease, and to that end we affirm the judgment, with costs.

BOOKSTAVEN, J., concurred.

Kings v. Townshend.

KINGS v. TOWNSHEND.

**SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, MARCH 1894.**

§§ 1638, 1639.

Pleading—in an action to determine claim to real property.

In an action to determine conflicting claims to real property, an answer denying that the plaintiff is in the actual possession of the property, and alleging that it is in the possession of a person holding as tenant or sub-tenant under the plaintiff is insufficient, inasmuch as it is not now necessary that the plaintiff have actual possession of the property in suit, but it is sufficient if he have constructive possession thereof.

A complaint in an action to determine a claim to real property which alleges that the defendant unjustly claims a fee in the premises, but which does not contain any facts to show that his claim is unjust, is insufficient.

Brown v. Teel (59 Hun, 91); Austin v. Goodrich (29 N. Y. 266), followed.

(Decided March, 1894).

Demurrer by plaintiff to defendant's answer, on the ground that it is insufficient in law upon the face thereof.

The facts are stated in the opinion.

L. A. Gould, for plaintiff and demurrer.

John Townshend, for defendant opposed.

LAWRENCE, J.—This is an action to determine conflicting claims to lots of land in the city of New York.

The complaint alleges that at the time of the commencement of this action the plaintiff was, and for one

Kings v. Townshend.

year and upwards next preceeding has been, in possession of the said lots, and during all of said time claimed and still claims said property in fee, and that the defendant, John Townshend, unjustly claims an estate or interest therein adverse to that of the plaintiff, to wit: the adverse claim that he is seized of said premises in fee.

The third defense in the answer alleges as follows: "Third. For a third defense this defendant denies that the premises described in the complaint at the time of the commencement of this action, and for one year and upwards next preceding, had been in the possession of the plaintiff, and this defendant alleges that at the time of the commencement of this action said premises were, and for more than one year next preceding the commencement of this action had been, and were, and still are in the possession of one John Hughes, holding the same as tenant or as sub-tenant of the plaintiff for a term which will expire on May 1st, 1894." To this defence the plaintiff demurs for insufficiency.

The action is brought under article 5th of title 1 of chapter 14 of the Code of Civil Procedure, as amended by Laws of 1891, chapter 210. That section, as amended, provides as follows: "§ 1638. Where a person has been, or he and those whose estate he has have been, for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance

Kings v. Townshend.

upon said property, of the amount or value of not less than \$250. But this section does not apply to a claim for dower."

Prior to this amendment these statutes required that the petitioner should allege actual possession, the language being the same as has had been employed in the Revised Statutes authorizing proceedings to compel the determination of such claims; and it had been held that the words "actual possession" in fact, affected by actual entry upon the premises, an actual occupation; and that therefore, when the premises were vacant, although a title thereto was held by deed by the plaintiffs a case within the statutes was not made out (*Churchill v. Onderdonk*, 59 *N. Y.*, 134; *Boylston v. Wheeler*, 61 *N. Y.* 521).

It is claimed, on the part of the defendant, that the third defence is not subject to a demurrer for insufficiency, on the ground that it denies that the premises were in the possession of the plaintiff as alleged in the complaint, and affirmatively alleges that the same were at the time of the commencement of this action and still are in the possession of one John Hughes, holding the same as tenant or subtenant of the plaintiff for a term which will expire on the first of May, 1894.

And it is asserted that the plaintiff does not, therefore, show such a possession as the statute contemplates. In this position I do not concur. I think it must be assumed that the Legislature in striking the word "actual" from section 1638 of the Code by the amendatory act of 1891, had in view the decisions of the Court of Appeals, above referred to, and intended that the action might be maintained by one who, although not in actual physical possession of the premises, was in constructive possession. The possession of the landlord is ordinarily the possession of the tenant, and I do not think that it can be properly alleged that such a possession does not satisfy all the requirements of the Code as now amended.

Kings v. Townshend.

The defendant, however, invokes the rule that where an answer has been demurred to the defendant is at liberty to attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*People v. Booth*, 32 *N. Y.*, 397; *Clark v. Poor*, 56 *State Rep.*, 122 123).

It is claimed by the defendant that the complaint does not state facts sufficient to constitute a cause of action, because by subdivisions 1, 2 and 3 of section 1639 of the Code as amended as aforesaid it is provided that the complaint in the action must set forth facts showing, first, the plaintiff's right to the real property, whether his estate therein is in fee, or for life, or for a term of years not less than ten, and whether he holds it as heir, devisee or purchaser, with the source from, or means by which his title immediately accrued to him; second, that the property at the commencement of the action was, and for the one year next preceding has been in his possession, or in the possession of himself, and those from whom he derives his title, either as sole tenant or as joint tenant, or tenant in common with others; third, that the defendant unjustly claims an estate or interest or easements therein, or a lien or incumbrance thereupon of the character specified in the last section.

The only allegation in respect to the claim of the defendant is contained in the third paragraph of the complaint, which is to the effect that the defendant, John Townshend, unjustly claims an estate or interest therein adverse to that of the plaintiff, to wit: the adverse claim that he is seized of such premises in fee. There are no facts stated which go to show that the defendant's claim is unjust, and I do not think that a complaint which is in the exact language of the statute, and which involves the mere conclusion of the pleader is sufficient.

Kings v. Townshend.

This point was directly decided by the General Term of the Third Department in the case of *Brown v. Teel* (59 *Hun.*, 91). In that case the complaint alleged "that the defendants who are children and grand-children of the said Elisha Brown, deceased, unjustly claim an estate in fee in said premises," and the court (LEARNED, P. J., delivering the opinion), says: "The defendants insist that this complaint sets forth no facts, but merely asserts that the defendants unjustly claim a fee in the premises. We think that the defendants are right. The case of *Austin v. Goodrich* (49 *N. Y.*, 266) is directly in point. There a demurrer to a similar complaint was sustained, because, among other grounds, no facts were stated showing that defendants unjustly claimed title. And it hardly needs argument to show that when a statute requires the complaint to state facts showing that defendants unjustly claim a certain estate it is not a compliance with the statute simply to allege that the defendants unjustly claim an estate without alleging any facts showing this."

The complaint being thus defective it follows that there should be judgment for the defendant upon the demurrer with leave to the plaintiff to amend upon payment of costs.

William L. Patton.

In re APPLICATION OF WILLIAM L. PATTON FOR HIS
DISCHARGE FROM IMPRISONMENT.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, MARCH,
1894.

§§ 2203 *et seq.*, 2208.

*Insolvent debtor—discharge from imprisonment—when not allowed because
schedule of property insufficient.*

To confer jurisdiction of a proceeding for the discharge of an imprisoned debtor from imprisonment, the papers upon which the application is founded should conform with exactness to the provisions of the Statute.

Where the schedules annexed to a petition for the discharge of an imprisoned debtor from imprisonment, instead of setting forth in detail property of the prisoners at the time of the application and the charges affecting it, states that there has been no substantial change in its condition, since he was first imprisoned—*Held*, that the application should be denied, for the reason, that the schedule stated conclusions and not facts with respect to the present condition of the property and was not sufficient to enable the court to determine whether the schedule was correct, and whether the petitioners' proceedings were just and fair.

(*Decided March 1894.*)

The facts appear in the opinion.

Oudin and Oakley, for petitioner and application.

Robert D. Honeyman, for judgment debtor, opposed.

GIEGERICH, J.—It is essential to the jurisdiction of of the Court, in proceedings for the discharge of an imprisoned judgment debtor from imprisonment, that the papers upon which the application is founded should conform with exactness to the provisions of the statute (*People v. Bancker*, 5 N. Y., 106; *People v. Brooks*, 40 *How. Pr.* 165; *Bullymore v. Cooper*, 46 N. Y., 236; *Shaffer v. Risley*, 114 N. Y., 23; *Bishop on Insolvent Debtors* (2nd ed., p. 87).

William L. Patton.

The Code requires that the petitioner must annex to his petition, and present therewith, "a schedule containing a just and true account of all his property, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned, and, also, as they exist at the time when the petition is prepared" (*Code of Civ. Pro.*, § 2203). Before the Court can direct an assignment it must be satisfied "that the petition and schedule are correct, and that the petitioner's proceedings are just and fair" (*Code of Civ. Pro.*, § 2208).

The petition herein is accompanied by an account of the prisoner's property, and the charges affecting the same, at the time, when he was first imprisoned. There is also annexed the following statement: "III. A just and true statement of all my property and charges affecting it as it existed at the time my petition was prepared, to wit: March 6th, 1894. There has been no substantial change in the condition of my property since I was first imprisoned."

This is the only statement contained in the moving papers relating to the prisoner's property at the time of preparing the petition, and, in my opinion, it wholly fails to comply with the requirements of the provisions of the Code above cited. Such is not the "just and true account" contemplated by the statute. The facts, not the mere conclusion from facts, must set forth in order that the Court may determine whether the schedule is correct and whether the petitioner's proceedings are just and fair.

No facts in this regard having been presented, I am unable to determine whether the assertion of the prisoner, that there has been no material change in the condition of his property since he was imprisoned, be true or false.

Application denied, with leave to renew on sufficient papers.

Torney v. Stiner.

In re TORNEY v. STINER, JUSTICE OF THE DISTRICT
COURT IN THE CITY OF NEW YORK, FOR THE
EIGHTH JUDICIAL DISTRICT.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,
FEBRUARY, 1894.

§ 2067, *et seq.*

Mandamus—cannot be used as a means of trying title to office.

Quo warranto is the proper and only proceeding for trying and adjudging the right to office, and as against an incumbent occupying under color of legal title, mandamus is unavailable and inoperative for the admission of an adverse claimant.

A mandamus will not issue to compel a Justice of a District Court in the City of New York to recognize as court attendant one whom he has removed from that office, when it appears that the Justice has appointed another person in his stead, and that that person is an incumbent of the office under claim of title from the regular appointing power.

(*Decided March, 1894.*)

Motion by the relator John Torney for a peremptory writ of mandamus requiring Joseph H. Stiner, Justice of the District Court in the City of New York for the Eighth Judicial District to recognize him as court attendant of said Court, and permit him to exercise the duties of his office.

The facts appear in the opinion.

John W. Goff, for relator, and motion.

William H. Clarke (Counsel to the Corporation), and
Theodore Connolly, for respondent, opposed.

Torney v. Stiner.

PRYOR, J.—The application is for a mandamus to Joseph H. Stiner, Justice of the District Court in the City of New York for the Eighth Judicial District, commanding him to reinstate and reappoint the relator to the position of Court attendant. It appears that in March, 1888, the relator was duly appointed an attendant in the Eighth District Court for an indefinite term; that at the time of his appointment, he was a privileged fireman within the provisions of section 1 of Chapter 577 of the Laws of 1892; that his salary as such attendant was paid by the City of New York; that on the 2d of January, 1894, he was removed from his position without cause and without a hearing; and that John Nunnery has been appointed to his place and position. It is conceded that the position of Court attendant is an office; and that Nunnery is now the incumbent of it, under a claim of title from the regular appointing power (Consol. act, § 1432).

Upon this state of fact the question instantly arises whether mandamus be the appropriate and available remedy for the wrong of which the relator makes complaint? If not, then inquiry as to the validity of his title would be a purely academic discussion; and although, in *Marbury v. Madison* (1 *Cranch*, 137) we have a memorable precedent for such sterile speculation, still the criticism incurred by Chief Justice Marshall for pronouncing upon a right not before the Court is little calculated to commend even that illustrious example to imitation.

It being of concern to the public interests that the functions of public office should not be suspended, a summary method for investing the legal incumbent with the actual possession of the office was indispensable; and from the earliest times such method was supplied by the writ of mandamus (*Moses on Mandamus*, 150; *High on Extraordinary Legal Remedies*, § 67; 3 *Blackst. Com.* 110).

It is upon this ground of public convenience that the

decisions in *Gorman v. The Board of Police* and *Titus v. The Board of Police* (35 *Barb.*, 527, 535) may be vindicated; and it is upon this ground only that in other cases of plain usurpation of office relief by mandamus may be reconciled with the fundamental principle that the writ is an inappropriate process to determine the title to office.

The inefficiency of mandamus as a method of trying title to office inheres in the nature of the writ itself, which issues only when the right is clear, and when no other legal redress is available, and which, involving only a contention between the relator and the respondent, is incapable of concluding the claim of a stranger. Hence, it proceeds in every instance upon the assumption that the applicant has an evident and consummate legal title, and if the writ show less it will be denied, for the Court cannot undertake in this proceeding to try a disputed right. In case of a contest there must be judgment of ouster against the incumbent before the writ will issue in favor of the contestant (*State v. Dunn*, 12 *Am. Dec.*, 28-30: note collating cases).

It is not gainsaid that in other jurisdictions mandamus has been employed apparently as a means of determining title to office; but on examination of those cases it will be seen that the right was really not in contestation, but only the custody of the insignia, and that the Courts simply refused to suffer a mere usurper to turn the holder of the legal title into the position of a contestant, and summarily awarded the possession to the unchallenged claimant (*Warner v. Myers*, 4 *Ore.*, 72; *Harwood v. Marshall*, 9 *Md.*, 83; *Dew v. Judges*, 3 *Hen. & Man.*, 1).

A writer of authority distinguishes the case where the applicant, as here, seeks restoration to office (*High on Ex. Legal Rem.* §§ 49, 67); but the diversity in the decisions goes not upon principle but upon the accidental circumstance that the right of the incumbent is commonly clear, and that the removal was a nullity. At all events the

Torney v. Stiner.

distinction is not recognized by the Courts of this State (People v. Goetting, 133 N. Y., 569).

But, whatever may be the course of adjudication elsewhere, in New York it is settled beyond controversy, that *quo warranto* is the proper and the only proceeding for trying and adjudging the right to office; and that as against an incumbent occupying under color of legal title, mandamus is unavailable and inoperative for the admission of an adverse claimant (People v. Goetting, 133 N. Y., 569; Nichols v. MacLean, 101 N. Y., 526; People v. Ferris, 76 N. Y., 326; Matter of Gardner, 68 N. Y., 467; People v. Lane, 55 N. Y., 217; People v. Stevens, 5 Hill, 616; People v. Vail, 20 Wend., 12; People v. Wendell, 57 Hun. 362; People v. New York, 3 Johns, 79).*

What would be my decision on the merits of relator's claim in the *quo warranto* or *certiorari* upon his removal it is unnecessary to indicate. It suffices that, for the reason given, the proceeding is not to be upheld.

Proceeding dismissed, with costs.

* In Short on Information, Mandamus and Prohibition, it is said:

"It has been frequently held a decisive answer to an application for a mandamus that there was another remedy by application in the nature of a *quo warranto*" (p. 233).

"The distinction between the class of cases in which the appropriate remedy is by *quo warranto*, and that in which the procedure by mandamus is to be adopted, cannot be too clearly kept in mind."

"Wherever the office is full de facto, the proper method of proceeding is by *quo warranto* to oust the occupant, if he is not in possession de jure. And the office is full defacto, through the election to it was illegal, provided it was a real and not merely a colorable election. If on the other hand, the election was merely colorable, so as to be really no election at all, it does not confer even a de facto possession; and the remedy of the person ousted by it is not *quo warranto* but mandamus" (p. 122.)

"Notwithstanding some want of precision in the authorities, the rule appears now to be established, that the validity of the title to an office, of which one person is in actual possession under a bona fide though illegal election, i. e. under an election which is not merely colorable, cannot be tried by mandamus" (p. 290).

Colberg v. Emerson.

COLBERG v. EMERSON.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, MARCH, 1894.

§ 649.

Attachment how levied.

An attachment is properly levied upon property which is subject to import duties, and, therefore, in the custody of the official of the U. S. custom-house, by serving upon the person in whose care and custody said property was placed and on behalf of the United States government, a certified copy of said warrant of attachment and notice showing the property attachment.

Clark v. Goodrich (41 N. Y. 214); Warner v. Fourth National Bank, (115 Id. 251); Cohen v. Orser (5 Duer. 250), followed.

Where property incapable of manual delivery is levied upon under an attachment, service of a general notice not specifying any particular property together with a certified copy of the warrant of the attachment is sufficient.

O'Brien v. Mechanics' and Traders' Fire Ins. Co. (56 N. Y. 55), followed.

(Decided March 5, 1894.)

Taxation upon application of the Sheriff of the City and County of New York of his fees for levying attachment issued in this action.

January 31, 1894, an attachment against the property of the defendant was issued to the Sheriff of the City and County of New York. At that time there was in the custody of the Collector of the Port of New York, 229 jackasses belonging to the defendant, the same being on the steamship "Tauric" then lying at Pier 38, North River. Thereafter the property was removed to No. 600 Greenwich Street, where it remained and at the time of making this motion, still remained in the custody of the said collector, who held it under a claim that the said jackasses were dutiable.

Colberg v. Emerson.

On February 3, the Deputy-Sheriff to whom was delegated the duty of executing the attachment, served a copy thereof, together with a general notice that he levied upon all the property of the defendant, upon the person in whose care and custody as the representative of the government the said property was, and thereafter on February 8, 1894, an order was served upon the Sheriff discharging the attachment upon a bond given by the defendant.

It was agreed by all parties that the value of the property was \$10,000. The Sheriff claimed for poundage \$275, and keepers' fees \$51, and the defendant refused to pay the same, asserting that the attachment had never been levied, and supporting that claim with proof that the property had never passed out of the custody of the government.

Burritt S. Stone (W. E. Stilling, Attorney), for Sheriff and application.

John A. Deady (Goodrich, Deady & Goodrich, Attorneys), for defendant, opposed.

ANDREWS J.—The Code of Civil Procedure provides that an attachment shall be levied upon personal property, capable of manual delivery, by taking the same into the Sheriff's actual custody, and upon other personal property by leaving a certified copy of the warrant and a notice showing the property attached with the person holding the same. The former Code of Procedure contained similar provisions, and the expression "Property incapable of manual delivery" has been the subject of judicial interpretation.

In *Clark v. Goodrich* (41 N. Y. 214) the Judge delivering the opinion of the Court, said: "I agree with

the Superior Court in holding that the expression, Property incapable of manual delivery to the Sheriff is applicable to property which not only in its nature is thus incapable of manual delivery, but also to that which has become so from its peculiar position, as where it is under pledge or consignment, with advances made upon the property."

In *Warner v. The Fourth National Bank* (115 N. Y. 251) the Court held that "an attachment would lie against securities in the hands of a party, where the party holding said securities had a lien upon the same, and the Sheriff could not take it into actual custody."

In *Colman v. Orser* (5 Duer. 250), an attachment had been issued against goods which were in the Custom House. In that case it was said by the Court that: "The alleged service, which is relied on as a valid levy, was made in August, 1853, and as the goods were then in the Custom House, and the duties unpaid, the counsel for the defendant was right in saying that the Sheriff could not require a manual delivery of the goods, but according to the decision of this Court, in *Brownell v. Carnley* (3 Duer. 9), could only execute the attachment under the mode prescribed by section 235 of the Code."

In the case at bar, an attachment was issued on January 31st, 1894, by this Court, and the affidavits submitted on the part of the Sheriff, state that he levied upon the animals therein referred to on the steamer "Tauric," lying at pier 38 North River. Such affidavits also state that after the goods had been removed to 600 Greenwich Street, in this city, the deputy Sheriff having the attachment served upon the person, in whose care and custody the said property was placed, for and on behalf of the United States Government, a certified copy of said warrant of attachment, and a notice showing the property attached.

The notice in question is a general one, and does not

Colberg v. Emerson.

specify any particular property, but it was held, in *O'Brien v. The Mechanics' and Traders' Fire Insurance Company* (56 N. Y. 55), that such a general notice is sufficient.

In view of the interpretation which, as above stated, has been placed by the Courts upon the expression "Property incapable of manual delivery." I think that in the case at bar a valid levy was made under the warrant of attachment.

This view seems also to have been taken by the attorneys for the defendant, for on the 8th of February, an order was obtained by them discharging the attachment. This order is as follows: "A warrant of attachment having been duly granted herein, on the 31st day of January, 1894, and issued to the Sheriff of the County of New York, and the defendant having applied for a discharge of said attachment, and having given the undertaking required by section 688 of the Code, and the same having been duly approved and filed; now, on motion of Goodrich, Deady Goodrich, attorneys for the defendant, it is ordered that the warrant of attachment granted herein, January 31, 1894, by Mr. Justice Lawrence, be and the same is hereby discharged." This order does not recite that a levy had been made, but it is difficult to understand why the attorneys for the defendant thought it necessary to obtain an order discharging the attachment if no levy had been made.

Under these circumstances, I think that the Sheriff is entitled to poundage. Section 2 of chapter 418 of the Laws of 1892 provides that where the warrant of attachment is vacated, set aside or discharged by order of the Court, the Sheriff shall receive poundage upon the value of the property attached, not exceeding the amount specified in the warrant. I understand that it is conceded that the value of the property attached largely exceeded the amount speci-

Hecla Powder Company v. Hudson River Ore & Iron Company.

fied in the warrant, which was \$10,000. The Sheriff will, therefore, be allowed \$275 for his poundage.

In view of the fact that the property was not actually taken into the custody of the Sheriff, the claim for keepers' fees has, I understand, been withdrawn.

HECLA POWDER COMPANY, RESPONDENT, v.
HUDSON RIVER ORE & IRON COMPANY
APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, APRIL,
1894.

§§ 539, 540, 723.

Pleading—variance between, and proof—amendment on appeal.

A recovery cannot be had upon another and different cause of action from that pleaded in the complaint if the objection is duly made.

Where the complaint in an action alleged that the plaintiff agreed to deposit a certain quantity of powder with defendant and to sell it to defendant at a certain price and the defendant agreed to use said powder exclusively, but instead used other powder; that if he had used said powder it would all have been consumed, and that through such breach of contract and through the negligence of defendant in allowing the powder to freeze and thaw, it deteriorated and became worthless and damaged plaintiff in a sum named, and the plaintiff proved upon the trial a cause of action upon contract for powder sold and delivered, and was allowed to recover thereon, although the defendant moved to dismiss the complaint on the ground that the cause of action proven, was not that pleaded,—*Held*, that the judgment should be reversed, and a new trial ordered; that the complaint could not be amended on appeal so as to conform to the proof.

Romeyn v. Sickles (108 N. Y. 650); *Read v. McConnell* (133 *Id.* 426), *Douglas v. Ferris* (138 *Id.* 192), followed.

A pleading cannot be amended on appeal to sustain the judgment appealed from, if the amendment substantially changes the claim or defense.

(Decided April 2, 1894.)

Hecla Powder Company v. Hudson River Ore & Iron Company.

Appeal by the defendant from a judgment entered herein in favor of the plaintiff upon the report of the referee.

The facts appear in the opinion.

Frank E. Smith, for defendant, appellant.

Judgment, even under Code practice, must follow the allegations of the pleadings. *Arnold v. Angell*, 62 *N. Y.* 508; *Southwick v. First National Bank of Memphis*, 84 *Id.* 420; *Romeyn v. Sickels*, 108 *Id.* 605.

The complainants alleged an express agreement to use the powder, and sought to recover for its breach. No such agreement was proved, but the Referee has allowed a recovery on an implied agreement of similar import. This was error. *Ritter v. Galitzenstein*, 13 *Daly* 452; *Horace Graves*, for plaintiff respondent.

If there is more in the complaint than the cause of action finally relied on, but that cause of action is stated clearly enough to be perceptible, and the cause of action so stated is proved, the complaint will not be dismissed even if the general aim of the complaint was to state a different cause of action from that finally relied on. *Conaughty v. Nichols*, 42 *N. Y.* 83; *Neftel v. Lightstone*, 77 *Id.* 96; *Graves v. Waite*, 59 *Id.* 156; *Tugman v. National Steamboat Company*, 76 *Id.* 207. This is not a case of variance nor could the defendant have been misled.

PRYOR, J.—The effect of subsequent examination and reflection is to confirm the impression intimated on the argument, that, pleading one cause of action, the plaintiff was allowed to recover upon another and different cause of action.

In his brief the learned counsel for the respondent

Hecla Powder Company v. Hudson River Ore & Iron Company.

says, "The plaintiff brought suit for a quantity of blasting powder sold to the defendant." In his report the learned referee says, "This suit is brought to recover the contract price" of the powder, and his conclusions of law on the facts proceed upon the same hypothesis. We cannot so construe the complaint. It alleges an agreement by plaintiff to deposit 60,000 pounds of powder in store at defendant's place of business, and to sell it to defendant at a certain named price; that defendant stipulated to use said powder "to the exclusion of all other powder; that defendant neglected to use the said powder, stored as aforesaid, but has used the powder of other manufacturers, and that in April, 1889, defendant refused to use said powder; that said powder so stored would all have been consumed before January, 1885, if the defendant had used it to the exclusion of all other; that said powder had deteriorated before April, 1889, through the breach aforesaid and the negligence of the defendant in allowing it to freeze and thaw many times, and had become worthless; that the plaintiff has been damaged by the conduct of the defendant as aforesaid in the sum of \$4,200." Here, indisputably, is a claim of unliquidated damages for breach of another agreement than to buy and pay for the powder. But, be the claim for such damages upon the breach of an executory contract of purchase, it is still a different cause of action from that for which the recovery was had, namely, goods sold and delivered. The point that the cause of action pleaded was not proved, the defendant raised by motion to dismiss the complaint.

In *Romeyn v. Sickles* (108 N. Y. 650), the Court of Appeals ruled that a pleading cannot be amended in a material respect, except at a time which will give the opposite party a right and an opportunity to meet by proof the new allegations against him; saying: "It is a fundamental rule that judgment shall be *secundum allegata et*

Hecla Powder Company v. Hudson River Ore & Iron Company.

probata, and any departure from the rule is certain to produce surprise, confusion and injustice."

In *Read v. McConnell* (133 *N. Y.* 425), the judgment was reversed because the recovery was for a cause of action not exhibited by the complaint; and adverting to the remedial policy of the reform code, the Court says: "The rule that a party coming into Court asserting one cause of action cannot recover on another and different one is unchanged. It is essential to the orderly administration of justice, and the protection of the rights of litigants."

In *Douglass v. Ferris* (138 *N. Y.* 192), it was held that a defendant cannot avail himself on appeal of a defense not pleaded, though apparent in the record; saying: "It is not every fact that appears in the record that a party can have the benefit of in this Court, but only such facts as have been pleaded and proven. *Secundum allegata et probata* is the rule that governs such cases."

Respondent solicits us, by virtue of section 723 of the Code, to conform his complaint to the proof; but the provision expressly qualifies the power of the Court by the condition that the "amendment does not change substantially the claim or defense." *Romeyn v. Sickles*, *supra*.

Other exceptions of probable validity appear in the record, but since, for the error indicated, the judgment cannot stand, they require no discussion. Judgment reversed, and new trial ordered; costs to abide the event.

BOOKSTAVEN and BISCHOFF, JJ., concurred.

 Fox v. Brooks.

FOX, RESPONDENT, v. BROOKS, *et al*, APPELLANTS.

CITY COURT OF NEW YORK, GENERAL TERM, MARCH, 1894.
§ 424.

Appearance—right of defendant not served, with summons—to serve notice of.

In an action against two alleged co-partners to recover upon a joint indebtedness where one only is served, the other has the right to voluntarily appear and answer.

Higgins v. Freeman (2 *Duer*. 652); *Wellington v. Classon* (18 *How. Pr.* 10); *Wheelock v. Lee* (74 *N. Y.* 498); *Martine v. Lowenstein* (68 *N. Y.* 412) followed.

In such a case where a notice of appearance for both defendants was served and accepted and thereafter the answers for each defendant and notice of trial was also served,—*Held*, that it was error to return the answer of the defendant not served with summons, and the notice of trial and that the plaintiff should be compelled to receive the same.

(*Decided March 9, 1894*).

Appeal by the defendants from the order of the Special Term denying a motion that the plaintiff's attorney be compelled to receive the answer of the defendant, Aaron Brooks, and the notice of trial served on behalf of both defendants.

The facts are stated in the opinion.

Otto Irving Wise, for defendants, appellants.

A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him—*Code Civ. Pro.* § 424. . . . Where two defendants as partners are to be made jointly liable, one not served may appear and plead infancy (*Wellington v. Classon*, 18 *How. Pr.* 10). . . . The service of a general notice

Fox v. Brooks.

appearance dispenses with the service of the summons for all purposes (*Catlin v. Moss*, 2 *N. Y. Civ. Pro.* 201).

Henry Zeimer, for plaintiff, respondent.

MCCARTHY, J.—This action was brought against “Solomon Brooks and — Brooks, first name unknown,” to recover the sum of \$161.56, with interest, for goods sold and delivered. The summons in this case is issued against “Solomon Brooks and — Brooks, first name being unknown.” The summons and complaint herein were served on the defendant Solomon Brooks on the 23d of January, 1894. On the next day, January 24th, 1894, a notice of appearance for both defendants was served on the attorney for the plaintiff. On Friday, January 26th, the answer of Aaron Brooks, one of the defendants, together with the defendants’ notice of trial, was served on the plaintiff’s attorney, as is shown by the affidavit of service. Thereafter, and on Monday, January 29th, the answer and notice of trial were both returned with the following indorsement :

OTTO IRVING WISE, Esq.—*Sir* : The within is hereby returned on the ground that the person Aaron Brooks, named as defendant, has not been served in this action, and no personal claim is made against him.

“HENRY ZIMMER, *Pf’f’s Atty.*

“*Dated, New York, Jan. 29th, 1894.*”

On the same day an order to show cause was obtained, returnable the next morning, why the answer and notice of trial thus returned should not be received by the plaintiff’s attorney. The motion was argued and denied, with the following memorandum :

“This motion must be denied. No personal claim is made against the answering defendant, and infancy is no defense as to the co-partnership property.”

Fox v. Brooks.

The only question here is, was the plaintiff bound to accept the answer and notice of trial served for and in behalf of the defendant Aaron Brooks, although he had not been served with the summons and complaint? The action was on a joint liability, and the notice of appearance was served and accepted for both defendants. This, then, was a voluntary appearance by the defendant Aaron Brooks, and equivalent to a personal service on him and waiver by the same of any irregularity. See *Code Civ. Pro.* § 424.

In *Higgins v. Freeman*, 2 *Duer*, 652, BOSWORTH, J., says: "I think the plaintiff is wrong in the position that a person named as defendant, and against whom personally a judgment is prayed, has no right to appear and answer until he has been served with a summons. The Code declares the voluntary appearance of a defendant equivalent to personal service of the summons on him. *Code Pro.* § 139. This assumes that he has a right to appear. It subjects him to the same liabilities as if personally served with process, and it would be a strange construction of this part of the Code that should hold he did not thereupon acquire all the rights of a party actually served."

Section 424 of *Code of Civil Procedure*, is, entirely, the latter part of section 139 of *Code of Procedure*. See, also, opinion of INGRAHAM J., in *Wellington v. Classon*, 18 *How. Pr.* 10, 11; *Wheelock v. Lee*, 74 *N. Y.* 498; and *Martine v. Lowenstein*, 68 *N. Y.* 456, 458.

The justice at special term, therefore, erred in his conclusions, and the order appealed from should be, and the same hereby is reversed, with costs to the appellant; and the motion to compel the plaintiff to accept the answer and notice of trial should be granted, with \$10 cost to the appellant.

VAN WYCK and NEWBERGER, JJ., concurred.

Seiser Bros. Co. v. Potter Produce Co.

SEISER BROS. CO. v. POTTER PRODUCE CO.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, MARCH, 1894.

§ 636 *et seq.*, 1780.

Foreign corporation—when Court without jurisdiction of action against.

An attachment issued in an action brought by a foreign corporation against the property of another foreign corporation; a judgment entered in the action upon its appearance and offer of the defendant and an execution issued thereon, will be vacated and set aside upon motion of a junior attaching creditor of the defendant where the affidavit upon which the attachment was granted and the complaint in the action fails to show that the contract sued on was made within the State or that the cause of action arose therein.

In such a case, if such facts do not appear, the Court cannot supply them arbitrarily, nor can it draw inference respecting the place at which the cause of action arose and the contract was made, and, therefore, the Court is without jurisdiction, and cannot obtain it by consent of the parties.

Robinson v. Ocean Steam Navigation Co. (16 N. Y. Civ. Pro. 255);
Smith v. Union Watch Co. (70 Hun. 348), followed. McCormack
v. Penn. R. R. Co. (49 N. Y. 303) distinguished.
(Decided March 1, 1894).

Motion by one Kuske, a junior attaching creditor of the defendant, to vacate an attachment issued in this action against the defendant's property; also to set aside judgment entered in this action and an execution issued thereon, on the ground that the Court was without jurisdiction of the action.

This action was brought by the plaintiff, a corporation organized under the laws of the State of New Jersey, against the defendant, a corporation organized under the laws of the State of Minnesota, to recover the sum of \$473.27 and

Seiser Bros. Co. v. Potter Produce Co.

interest for merchandise sold and delivered to defendant by plaintiff.

The plaintiff procured an attachment against the property of the defendant, and issued it to the Sheriff of the City and County of New York, who levied upon certain butter which had been consigned by the defendant to Droste & Snyder for sale on commission, and which was subsequently sold, realizing the sum of \$371.90 in addition to the expenses of the sale.

The defendant appeared in the action and made an offer of judgment which was accepted, and on which judgment was entered January 5, 1894. An execution thereon against the property of the defendant was thereafter on the same day issued to the Sheriff of the City and County of New York.

Thereafter the moving creditor, Koske, upon a complaint and affidavit showing the facts required by Statute procured an attachment against the property of the defendant in an action brought by him against said defendant in the City Court of New York. This attachment was issued to the Sheriff of the City and County of New York, January 5, 1894, who levied upon the same property, and a judgment was entered in that action upon the appearance of the defendant on January 27, 1894. Thereafter this motion was made.

John Brooks Leavitt (Leavitt, Wood & Keith, Attorneys),
for junior attaching creditor and motion.

Elon S. Hobbs, for plaintiff, opposed.

PATTERSON J.—This motion is made by a junior attaching creditor to vacate an attachment granted to the plaintiff in this action, and also to vacate a judgment

Seiser Bros. Co. v. Potter Produce Co.

entered in favor of the plaintiff herein against the defendant, and an execution issued on such judgment.

The question discussed relates to the jurisdiction of this Court over foreign corporations. The papers show that this plaintiff and the defendant are both corporations of that character.

In the month of November, 1893, and in this action, an attachment was granted upon an affidavit which clearly was insufficient to confer jurisdiction under the rulings in *Smith v. The Union Milk Co.* (70 *Hun.* 348), inasmuch as it failed to set forth that the contract sued on was made within the State, or that a cause of action arose therein.

On the 2d day of January, 1894, the defendant in this cause appeared, by an attorney, and offered to allow judgment for a certain sum to be entered against it. That offer was accepted, and judgment in accordance therewith was entered and execution was issued.

On the 5th day of January, 1894, the party now moving, being a resident of the State, brought an action in the City Court and obtained a warrant of attachment against the defendant, and he now seeks to advance his lien by having both the intermediate and final process of this Court declared to be invalid as having been issued without jurisdiction to do so.

That the granting of the plaintiff's warrant of attachment was unauthorized is quite clear, but the question remains as to the judgment and execution. That judgment was entered after and upon a general appearance of the defendant by attorney.

Prior to the enactment of the *Code of Civil Procedure* that submission to the jurisdiction of the Court would have sufficed to maintain the judgment. That was held in the well known case of *McCormack v. Pennsylvania R.R.* (49 *N. Y.* 303).

By the sections of the former *Code of Procedure* relating

Seiser Bros. Co. v. Potter Produce Co.

to the subject of the jurisdiction of the Courts of this State over foreign corporations at the suit of non-residents, no limitation was placed up in the general common law power to entertain such actions when service of process was personally made upon their officers within the State, and general appearance by attorney was equivalent to such service. But by section 1780 of the Code of Civil Procedure a different rule of jurisdiction was adopted and a distinct limitation has been placed upon it.

The right of the non-resident or of the foreign corporation to maintain such an action as this in the Courts of this State is confined to the cases specified in the section referred to, and the decision in *Robinson v. Ocean Steam Nav. Co.* (16 *N. Y. Civ. Pro.* 255) directly covers this question, and holds that an action by a non-resident, etc., cannot be maintained against a foreign corporation on a cause of action which arose out of the State, and that the jurisdiction of the Courts is defined and limited, and absolutely confined to the cases specified.

This necessarily excludes the idea that appearance and consent can confer jurisdiction in any other case or on any other cause of action, and, indeed, in the *Robinson* case the report shows that the defendant had joined issue by answering, and even went so far as to notice the case for trial. The Court proceeded to say: "It is not sufficient that a non-resident plaintiff should by any service of process or in any other way obtain jurisdiction of a foreign corporation; but before the action can be maintained there must also be jurisdiction of the subject matter of the action. Jurisdiction of the action cannot be conferred upon the Court by any consent or stipulation of the parties."

We are not at liberty to draw any inferences respecting the place at which the cause of action arose or the contract was made. The complaint is silent as to that. The nec-

Weiss v. Morrell.

cessary avertments to give jurisdiction are wanting to the complaint as well as in the affidavit on which the attachment was granted, and the Court cannot supply them arbitrarily. Such avertments are part of the subject matter of the action, and without them no cause of action is shown, and the failure to plead them is fatal.

The ordinary presumption concerning Courts of general jurisdiction do not apply in this case under the terms of section 1780 as they are explained and interpreted in the Robinson case above cited.

The motion must be granted with \$10 costs.

WEISS *et al*, RESPONDENTS, *v.* MORRELL *et al*,
APPELANTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, MARCH
1894.

§ 789 *et seq.*, 977.

Notice of trial—effect of defect in—short cause calendar.

Where on December 23, 1893, a notice of trial was served "for the second day of January, 1863,"—*Held*, that as the latter date was obviously a clerical error the defect might be waived by the party receiving the notice, and that it was waived by his retaining it, and it became a sufficient notice for the coming January; that if the defendants intended to object to the irregularity they should have returned the paper with the notification of their reasons.

The provisions of the code of civil procedure relating to preferences of causes upon the calendar of the courts are not exclusive, and do not limit the power of the court over their calendars not prohibiting the establishing of a calendar for short causes.

Where appeals to the court of common pleas involve mere questions of procedure in the city court of New York, and do not effect substantial right or the merits, the appellate court will not interfere.

(Decided March 8, 1894.)

Weiss v. Morrell.

Appeal by the defendants from an order of the general term of the City Court of New York, affirming three orders of its special term, *to wit.*: one placing this cause upon the short cause calendar; another denying a resettlement thereof; and the third denying a motion to strike the cause from both the short cause and general calendar of said court.

The facts appear in the opinion.

Charles E. Souther, for defendant, appellant

Alfred B. Jaworower, and *Louis Lowenstein*, for plaintiff, respondent.

DALY, C. J. A notice of trial was served by plaintiffs' attorney upon the defendants' attorney on the 23d of December, 1893, for the 2d day of January, 1893. The latter date was obviously a clerical error, and the defect might be waived by the party receiving the notice, and in this case it was waived, because the notice was retained. If defendants intended to object to the irregularity, they should have returned the paper, with a notification of their reasons and then a proper notice of trial could have been served. By retaining the paper they must be deemed to have regarded it as a sufficient notice, and in that case it was a notice for the coming January, as it would not have been a sufficient notice for a past date.* The case was therefore

* In *Silliman v. Clark* (2 How. Pr. 160), a notice of trial for the fourth day of April, which was retained without objection, was held sufficient notice for the fourth Monday of April.

In *Wolfe v. Horton* (3 Cal. 86), a notice trial which stated the day of the month for which the trial was intended to be noticed correctly, but misstated the day of the week was held sufficient.

In *Bander v. Covill* (4 Cow. 60), a notice of trial for the third Monday, was held sufficient for a circuit commencing on the third

Weiss v. Morrell.

properly on the general calendar, and might be placed upon the special calendar for short causes.

The appeal is mainly argued on the question as to whether the courts of this State have power to appoint a short-cause calendar, and place causes thereon for trial out of their order upon the general calendar. It is claimed that this is giving a preference to certain causes not enumerated in the statute of preferences. *Code Civ. Pro. v. 8*, tit. 6, art. 2, §§ 789-795.

The provisions of the Code are not exclusive, and do not limit the power of the Courts over their calendars, nor consequently prohibit the establishing a calendar for short causes, according to the practice of all the Courts long before the adoption of the present Code. The general rules of practice under which such summary trials are had are not inconsistent with any provision of the Code; for, since the statute recognizes the propriety of granting certain preferences, the granting of a preference in any other special case is entirely consistent with the statutory provision.

The short-cause rule is also attacked upon the ground that the right to move under it is confined to the plaintiff, to the exclusion of a defendant who has pleaded a counter-

Tuesday, where it appeared that the party upon whom it was served was not misled.

In *N. Y. Central Ins. Co. v. Kelsey* (13 *How. Pr.* 535), a notice of trial for the third Tuesday was held sufficient where the circuit was to begin on the third Monday.

In *Jackson v. Brownson* (4 *Cow.* 51), a notice of trial for the next term to be held at a specified place was held good although it specified the wrong day.

In *Quick v. Merrill* (3 *Cat.* 133), an error in spelling the name of one of the parties Jeunias, where it should have been Teunis was held immaterial.

A defect in a notice of trial which does not mislead is waived if the notice is not promptly returned.—(*N. Y. Central Ins. Co. v. Kelsey*, 13 *How. Pr.* 535; *Silliman v. Clark*, 2 *Id.* 160.)

Weiss v. Morrell.

claim, and who is entitled to all the remedies of a plaintiff. As the defendants here do not set up a counter-claim, it is not necessary to discuss this point. It by no means follows, however, that under the rules of the city Court, or of the other Courts, a defendant with a counter-claim would not be allowed to move for the short-cause calendar. No injury was done to the defendants by the entry of the order setting the cause down for the 4th instead of the 2d of January, which latter date was that specified in the notice. The decision upon the motion not having been rendered in time for a trial upon the latter date (owing to the rule which requires that the order be filed with the clerk at least two days before the day on which a case shall be entered on the special calendar), it was proper to fix a later date. As defendants had notice of such date, they were not injured, and their motion to resettle the order, and to strike the cause from the special calendar, was properly denied.

These appeals involve a mere question of procedure in the City Court, and do not affect any substantial right or the merits. In such case this Court will not interfere. *Waters v. Curtis*, 13 *Daly*, 179; *Whitney v. Townsend*, 67 *N. Y.* 40.

Orders appealed from affirmed, with costs and disbursements.

BISCHOFF and PERRY, JJ., concurred.

Adams v. Stevens.

ADAMS v. STEVENS AND ANOTHER.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, MARCH,
1894.

§ 484.

Pleading—joinder of causes of action—demurrer.

Where a complaint in an action against two defendants states a cause of action against each severally, but does not state one against them jointly, the defendants may jointly demur on the ground of the misjoinder of causes of action.

A complaint may be demurred to on the ground that causes of action are improperly united therein, although the several causes of action are undistinguishably blended in a single count.

A complaint setting forth the employment of the plaintiff, attorney, by one of the defendants, to conduct a litigation; the transfer of the subject matter of the action to the other defendant, his ratification of the retainer and the prosecution of the litigation for him, states a separate cause of action against each defendant and not a joint cause of action and is properly demurred to for improperly uniting two causes of action. The defect is not cured by a formal allegation of a joint and several indebtedness—

(Decided February, 1894.)

Demurrer by defendant to complaint in an action to recover for attorney's services on the ground that two causes of action are improperly united therein. The opinion states the facts.

Noel Gale, for defendants and demurrer.

Melville H. Regensburger, for plaintiff, opposed.

PRYOR, J.—In an action by an attorney for professional services, the defendants jointly demur to the complaint for misjoinder of causes of action, in that the

Adams v. Stevens.

two alleged causes of action do not affect both defendants.

If the complaint in an action against two defendants states facts showing a cause of action against each separately, but not a cause of action against both jointly, the defendants may demur jointly on the ground of the misjoinder of causes of action (*Hess v. Buffalo & Niagara R. R. Co.*, 29 *Barb.* 391).

And the demurrer is not obviated by the fact that the several causes of action are undistinguishably blended in a single count or complaint (*Goldberg v. Utley*, 60 *N. Y.* 427; *Wills v. Suydam*, 64 *Id.* 873; *Harris v. Eldridge*, 5 *Abb. N. C.* 278; *Zorn v. Zorn*, *Hun*, 67).

By section 484 of the Code of Civil Procedure, the plaintiff may unite in the complaint two or more causes of action on contract, "where they effect all the parties to the action" (*Nichols v. Drew*, 94 *N. Y.*, 22, 26*).

The question for decisions is, whether two causes be apparent upon the complaint; and if so, whether they affect both defendants?

That two causes of action are stated in complaint is manifest beyond doubt. One cause of action is against the defendant Stevens; and it arises on her retainer of the plaintiff in March or April. The other cause of action is against the defendant Rankin; and it arises on his subsequent and independent retainer of the plaintiff. True, Rankin's retainer of the plaintiff was if you please, by ratification of Stevens' previous retainer of the plaintiff; but all the same it is Rankin's contract that constitutes the basis of his obligation. True, too, that the services which plaintiff was to render on Rankin's retainer were in respect, if you

* In that case cited, it was held that where the complaint set forth causes of action on contract which did not effect all the parties or were not consistent with each other, it was defective and properly demurred to as improperly uniting causes of action.

Adams v. Stevens.

please, of the same subject-matter of litigation for which Stevens retained Rankin; but then, this subject-matter had been assigned by Stevens to Rankin; and so, after all, plaintiff's services were for the benefit of Rankin and in pursuance of his retainer. But, in truth, the services rendered by plaintiff to Stevens were in and about the recovery of certain securities, stocks and other property; and the services rendered to Rankin were in and about the recovery of different stocks, securities and property, which became his by assignment from Stevens.

It is open to plausible conjecture that Mrs. Stevens simply substituted Rankin in the litigation as her agent during her sojourn in Europe; but the complaint asserts a right of action against Rankin, and I am only to decide whether, on the face of the pleading, such cause of action affects the defendant, Stevens (*Higgins v. Critchton*, 11 Daly, 114).

I cannot perceive how, by possibility, Stevens is concerned in a claim by plaintiff against Rankin for services rendered on his retainer and for his benefit.

Still clearer is it that Rankin has no conceivable concern in plaintiff's claim against Stevens for services rendered to her upon her retainer and before Rankin succeeded to any interest in the subject-matter of those services.

The case is not of a joint or mutual interest between Stevens and Rankin in the subject-matter and the services, but of successive and separate interests in the subject-matter and the services. A joint liability is the effect of a joint obligation (*Rider v. Roach*, 97 *N. Y.* 378, 382).

The conclusion upon the reason of the case is sustained by authority (*Tibbitts v. Percy*, 24 *Barb.* 39, 42; *Brewster v. Silence*, 8 *N. Y.* 207, 215; *Hess v. Buffalo & Niagara R. R. Co.* 29 *Barb.* 391, 394; *Kelly v. Neuman*, 62 *How. Pr.* 156; *Taylor v. Manhattan*, 53 *Hun*, 305; *Pracht v. Ritter* 48 *N. Y. Super.* 509; *Barton v. Spies*, 5 *Hun*, 60; *De*

Rich v. The Sargent Granite Co. .

Cumont v. Morgan, 21 *Weekly Dig.* 357; Gray v. Rothchild, 112 *N. Y.* 668; Church v. Stanton, 9 *N. Y. St. Rep.* 121; Bort v. Yaw, 46 *Iowa*, 323; Johnson v. Kirby, 65 *Cal.* 482; Doan v. Holly, 25 *Mo.* 357).

I observe nothing inconsistent in plaintiff's citations.

Of course, the infirmity in the pleading is not repaired by the formal allegation of a joint and several indebtedness (*Abbott's Trial Brief on the Pleadings*, 238.)

Demurrer sustained, with direction to divide the action.

RICH v. THE SARGENT GRANITE CO.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, MARCH, 1894.

§ 1788.

Receiver of coporation—power of temporary—examination of person having property.

A temporary receiver of a corporation has power to maintain any action or special proceeding for the purpose of collecting, receiving or preserving the property of the corporation.

A proceeding by a temporary receiver of a corporation to examine a person who is alleged has in his possession property that should be taken possession of by the receiver is a special proceeding for the purpose of collecting, receiving and preserving the property of the corporation, and one which the receiver is entitled to maintain.

Instance of a case where such an examination was directed.

(Decided March 1, 1894.)

Application by Peter B. Olney, receiver of the defendant corporation, for a warrant upon which Matthew P. Baird, George L. Harrington, William K. Keyes, William J. Clarke and William D. Baird shall be taken and brought before a Justice of this Court for the purpose of being

Rich v. The Sargent Granite Co.

examined concerning any property of the defendant which it may be claimed, that they, or either of them have.

This action was brought by a judgment creditor of The Sargent Granite Company after issuance and return unsatisfied of an execution against its property to obtain a sequestration of the defendant's property. The defendant appeared and served an answer, and upon motion of the plaintiff an order was made May 23d, 1893, appointing Peter B. Olney receiver during the pendency of this action of the property of the defendant. The receiver qualified October 2, 1893, and thereafter made this motion.

Samuel A. Noyes, for receiver and motion.

Joseph Fettretch, (*Fettretch, Silkman & Seybel, Attorneys*), for Matthew P. Baird and others, opposed.

INGRAHAM, J.—I think under section 1788 of the Code a temporary receiver has power to maintain any action or special proceeding for the purpose of collecting, receiving or preserving the property of the corporation, and that a proceeding to examine any person who is alleged to have in his possession property that should be taken possession of by the receiver is a special proceeding for the purpose of collecting, receiving and preserving the property of the corporation.

The provisions of the Revised Statutes, under which this application is made, appear to be still in force,* and if

* In that portion of the Revised Statutes which related to proceedings against corporations in equity for the sequestration of their property or their dissolution because of insolvency it was provided:

"The Court shall proceed thereon as in other cases, and when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers, who shall possess all the powers conferred, and be subject

Rich v. The Sargent Granite Co.

the receiver brings himself within the provisions of the statute it would seem that he would be entitled to the relief asked, and I think the affidavits are sufficient to entitle him to such relief.

It appears that Matthew Baird was the principal stockholder, a trustee and the treasurer of the corporation, and that on the 16th of April, 1892, he resigned as trustee and treasurer, and transferred all his stock to one Harrington, who was thereupon elected a trustee of the company and

to all the obligations imposed on receivers, by article third of this Title." (2 R. S. p. 465, § 46).

This section was repealed by Laws of 1880 chap. 255. The provision contained therein relative to the appointment of a receiver and his powers were not re-enacted (See Throop's note to Code Civ. Pro. § 1792) but provision for the appointment of temporary and permanent receivers of corporations was made in Sections 1788, 1789, 1810 and 2429 of the Code of Civil Procedure.

The provisions of "article third of this title" referred in the section of the Revised Statutes above quoted are contained in 2 R. S. p. 469 §§ 66-89. These sections are still in force.

Chapter 245 of the Laws of 1880 provides that all the third part of the Revised Statutes are Repealed except "of chapter eight The following portions of title fourth, namely, ... Sections 66 to 89, both inclusive, which are hereby made applicable to a permanent receiver appointed as prescribed in section 1788 of the Code of Civil Procedure" which section relates to temporary and permanent receivers in an action to sequester the property of a corporation or for its dissolution.

Section 72 of said statute is as follows.

"After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers: and all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation" (2 R. S. p. 469 § 72).

The provisions relating to trustees of insolvent debtors are also unrepealed and so far as material are as follows:—

"§ 12. Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the

Rich v. The Sargent Granite Co.

its president, and that subsequently Matthew Baird became, by virtue of a bill of sale in the nature of an equitable mortgage, the owner of most of the property of the company. Said Baird claims title to such property under various bills of sale and leases, and under a sale made by the Sheriff of Waldo County, in the State of Maine, upon an execution entered on a judgment in favor of said Baird against the corporation for the sum of \$146,000.

These facts of themselves, I think, give the receiver the right to examine into the transactions between Baird and the company, and bring the case within the provision of the statute referred to.

The motion will therefore be granted; order or warrant to be settled on notice.

first section of the seventh article of this title, or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in the said trustees; or that that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant, commanding any sheriff or constable, to cause such debtor, his wife, or other person, to be brought before him, at such time and place as he shall appoint, for the purpose of being examined."

"§ 13. The officer issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer."

"§ 17. The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this Article for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect, as if they had been made in answer to a bill in equity filed by such trustee." (2 R. S. pp. 43, 44, §§ 12, 13, 17).

Sections 14 to 16 both inclusive relate to the mode of punishing one refusing to be sworn or answer.

Myers v. Rosenback.

MYERS v. ROSENBACK.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, MARCH
1894.

§§ 544, 2934, 2944, 3347.

*District Court in the City of New York - amendment of pleading—
supplemental answer not allowed.*

On the removal of a cause from a District Court in the City of New York to the Court of Common Pleas, it continues in effect to be an action in a District Court, subject to the incidence of such an action, including the right of the amendment of the pleadings.

As a condition of allowing the amendment of a pleading in an action in a District Court in the City of New York, the Court may, in its discretion, require the payment of costs to the adverse party.

Supplemental pleadings are not authorized in an action in a District Court in the City of New York, nor can they be permitted in an action removed from such a Court to the Court of Common Pleas, but the result which could be obtained thereby may be substantially accomplished by an amendment of the original pleading.

Russell v. Ruchman, (3 E. D. Smith 419) followed.

Upon a motion for leave to serve a supplemental answer the Court, may, under the prayer, for other and further relief in the notice of motion, permit an amendment of a pleading, while denying leave to serve a supplemental pleading.

(*Decided March, 1894*).

Motion by the defendant for leave to serve a supplemental answer, setting up in addition to the defenses already interposed herein, a judgment recovered in the City Court of New York, as a bar to this action.

The facts appear in the opinion.

Otto Howitz, for defendant and motion,

Hamilton R. Squires, for plaintiff and opposed.

GIEGERICH, J.—This action was removed from a District Court to this Court. The defendant now seeks,

Myers v. Rosenback.

by a supplemental answer, to set up an additional defense. The counsel for the plaintiff contends, substantially that the District Court had no power, before the removal of the action, to allow a supplemental answer, and that, consequently, this Court has no power to grant the same.

On the removal of a cause from a District Court to this Court, it continues to be, in effect, an action in a District Court, subject to the incidents of such an action, including the right of amendment of the pleadings¹ (*Lattiman v. Ferre*, 11 *Civ. Pro. R.* 217; *Walker v. Scott*, 3 *Misc. R.* 329, 233 *N. Y. Suppl.* 334; 23 *Civ. Pro.*, 90); and as a condition of allowing an amendment, the Court may, in its discretion, require the payment of costs to the adverse party (*Code of Civ. Pro.* § 2944, which is made applicable to District Courts by section 1347 of the Consolidation Act. Laws of 1882, chap. 410).

The power of District Courts to allow a supplemental answer to be filed was questioned by this Court in *Russel v. Ruckman* (3 *E. D. Smith*, 419, 426); and I have not been referred to nor have I been able, after diligent research, to find any authority which confers such power upon them.

Sections 2934 to 2944 (both inclusive, of the Code of Civil Procedure, which relate to pleadings in District Courts and amendments thereof (Const. Act, § 1347), are silent as to supplemental pleadings; the provisions of the Code (§ 544) regarding the same being expressly limited to Courts of record (*Code of Civ. Pro.*, § 3347, subd. 4).

While the proposed additional defense cannot, for these reasons, be set up by a supplemental answer, still the same result may be accomplished by an amended answer.

That substantial justice will be promoted by such an amendment appears to my satisfaction from the papers submitted. Plaintiff's counsel insists, however, that inasmuch as the defendant has not applied for leave to serve an amended answer, the motion should be denied; but under

Shapiro v. Burns.

the words "and for such other and further relief in the premises as to the Court may seem just and proper," in the notice of motion, the Court is empowered, in its discretion, to grant other relief than prayed for (*Van Slyke v. Hyatt*, 46 N. Y. 259, 264). Therefore the defendant will be permitted to amend his answers by setting up, in addition to the defense already interposed, as a plea in bar in these actions, the judgment in the action the City Court, upon condition that, within ten days after the entry of the order hereon, he serve such amended answers.

As the judgment in question was not entered until recently, and as the defendant has not been guilty of any laches, I am of the opinion that the only terms which should be imposed, as a condition to allowing the amendment, are \$10 costs to the plaintiff in each action to abide the event.

SHAPIRO, AN INFANT, BY ADOLPH SHAPIRO, *her guardian, ad litem*, v. BURNS AND ANOTHER.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, FEBRUARY, 1894.

§§ 458, 459, 462.

Right of poor person to sue in "forma pauperis"—infant—effect of wealth of guardian ad litem.

An infant upon a showing proper state of fact, is entitled to an order granting him leave to sue as a poor person, notwithstanding an order has been made requiring him to give security for costs; the granting of the application involves a vacatur of the order for security for costs.

The possession of wealth by the guardian *ad litem* of an infant plaintiff is not a bar to the plaintiff's application for leave to sue as a poor person; it is the poverty of the plaintiff and not of the guardian *ad litem* that confers the privilege of suing as a poor person.

Shapiro v. Burns.

Upon compliance with the statutory conditions a poor person has the right to sue *in forma pauperis*, and the granting or refusal of leave to sue is not in the discretion of the judge to whom application therefor is made.

When by permissive words, power is conferred upon an official for the benefit of the public or a third person, the word "may" means "must," and power is the equivalent of duty.

(Decided February, 1894.)

Motion by the plaintiff for leave to prosecute this action as a poor person.

The facts appear in the opinion.

Charles M. Koplik, for plaintiff and motion.

William S. Cogswell, for defendant, opposed.

PRYOR, J.—Before action brought a guardian *ad litem* was appointed for the infant plaintiff; after action commenced, an order was made requiring the plaintiff to furnish security for costs; but instead plaintiff now moves for leave to prosecute the suit *in forma pauperis*.

It is plain upon the terms of the statute §§ 458 and 459, Code of Civil Procedure that an infant may be allowed the privilege of suing as a poor person, and that application for the privilege may be made after the commencement of the action. From the reason of the thing, leave to prosecute *in forma pauperis* must be accorded before or during the pendency of the action; but otherwise no limitation of time is prescribed for the application.

The defendant objects that the Court has directed that the plaintiff give security for cost. But the motion involves a vacatur of the order of security: and, the order out of the way, that permission to prosecute the action as a poor person may be now conceded, is plainly the opinion of the

Shapiro v. Burns.

Court of Appeals (*Shearman v. Pope*, 106 N. Y. 664, S. C., 12 N. Y. Civ. Pro. 329). Were it not so, then, as here, a defendant might, within two days after suit brought, preclude the plaintiff from the right of prosecuting *in forma pauperis*—a right, as already seen, open to him at any time during the pendency of the action.

It is still insisted that, because the guardian *ad litem* is father of the plaintiff and a man of means, the plaintiff should not be suffered to prosecute as a poor person. But the wealth of the father is not the wealth of his child; nor will the product of the suit if successful, inure to the benefit of the father. The Code is explicit, that it is the poverty of the plaintiff, not of the guardian *ad litem*, that confers the privilege of suing as a poor person.* Beside section 469 of the Code, by requiring a "responsible person" to be guardian *ad litem*, and rule 49, by exacting that the guardian shall be of "sufficient ability to answer to the infant" for misconduct of the trust, demonstrate that the possession of means by the guardian is no bar to the plaintiff's application to sue as a pauper.

It is urged, however, and urged with force, that if the order be granted, then the plaintiff cannot possibly lose nor the defendant possibly gain by the event of the litigation, and that yet, without the least hazard on her part, the plaintiff may recover \$5,000 of the defendant. This game of "heads I win and tails you lose" in a lawsuit, was not possible in our jurisprudence until 1891, when, for the first time, the liability in costs of a guardian *ad litem* for a poor person was abolished. This disparity

* In almost every case in which the right of an infant to sue as a poor person has been considered, the petition for leave so to do has stated that the guardian as well as the infant was a poor person. This error undoubtedly led to the confusion which prior to the amendment of sections 458, 459 and 3268 by chapter 170 of the Laws of 1891 existed on this subject. See *Nichols v. Cammann*, 2 N. Y. Civ. Pro. 375; *Irving v. Garrity* 4 *Id.* 105; *Erickson v. Poey* 5 *Id.* 379.

Shapiro v. Burns.

of advantage between the parties in an action may not be thought to consist with justice, but *ita lex scripta est*, and I must apply the law as it is given to me.

It is argued, however, that the unequal operation of the statute appeals to the judicial discretion against the allowance of the order. Is it discretionary with the Court to accord or to refuse a plaintiff the liberty of suing as a poor person when he conforms to the prescribed conditions? True the language of the Code is that the Court *may* admit him to prosecute as a poor person; but it is the settled rule of construction that when by permissive words power is conferred on an officer for the benefit of the public or third persons "may" means "must," and power is the equivalent of duty (14 *Am. & Eng. Encyl. of Law*. pp. 979-981).

That, upon compliance with the statutory conditions, one has a right to sue as a poor person is apparent from the nature of the case and all the provisions of the law on the subject.

Upon principle judicial discretion is an anomaly in free government, and from its liability to abuse should be tolerated with the least possible latitude in operation. The State says all persons in a particular category may have access to its courts without expense; and for me to repel any one of the class upon my estimate of his desert would I conceive, be inconsistent with the mandate of the law, and a precedent fraught with possibilities of arbitrary and unjust discrimination.

If the Legislature had intended to repose the power in the discretion of the Judge it would have said so in terms, as it did in conferring authority to revoke the leave to sue *in forma pauperis* (*Code of Civ. Pro.* § 462).

If, however I have a discretion, I exercise it in favor of the plaintiff.

Motion granted; no costs.

Flynn v. Lynch.

FLYNN v. LYNCH, *et al.*SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, FEBRUARY, 1894.

§§ 1581, 2351

Partition—disposition of infant's share—death of owner of share after sale.

An infant's share of the proceeds of real property owned by him as tenant in common with others, and sold under and in pursuance of a judgment in an action for partition, remains impressed with the character of real estate, and when he dies after the sale and before attaining his majority, the fund descends as real estate to his heirs at law, and an order should not be made directing its payment to the administratrix of his property. Section 2359 of the Code of Civil Procedure as amended by chapter 523 of the laws of 1892, providing for the payment of the proceeds of real property of an infant in certain cases after his death to an administratrix does not apply to such a case, but applies to a case where the sale of property is directed because its income is not sufficient for the payments of its debts or for its maintenance, etc.

Where the final judgment in an action for partition directed that the shares of infant owners be paid into court to be invested in permanent securities at interest in the name and for the benefit of such infant, and such investment was duly made by the chamberlain, the court cannot direct that an infant's share be paid to his general guardian. *It seems* that the Code, section 1581 as amended by the laws of 1892, chapter 558, confides to the discretion of the court the question as to whether the money shall be paid to the general guardian or remain invested by the chamberlain, and that where that discretion has been exercised by the judgment, an order directing the payment of the money to the general guardian is improvidently granted.

(Decided February 28, 1894.)

Motion to set aside *ex parte* order directing the chamberlain of the city and county of New York to pay the moneys held by him for the benefit of three children to the administratrix of one and the general guardians of the other two.

Flynn v. Lynch.

This action was brought by the plaintiff against her mother, Mary Lynch, her brothers, Edward F. Lynch, Daniel Lynch and Joseph Lynch and her sister, Angela Lynch, to procure a partition or sale of certain real property of which her father had died seized, and which, he having died intestate, descended to the said parties. After the sale of the property and the deposit of the greater part of the share of the defendants Daniel, Joseph, and Angela Lynch, who were infants, with the chamberlain of the city and county of New York, said Daniel Lynch died, being of the age of eighteen years. Thereafter the balance of the proceeds of the sale was deposited with the said chamberlain. The decedent's mother, Mary Lynch, applied for letters of administration upon his estate. She also applied for letters of general guardianship upon the estate of the defendants Angela Lynch and Joseph Lynch, who were infants, and then applied for and obtained an order directing the payment of the shares of said deceased defendant's estate to her as his administratrix, and of the other shares to her as such guardian. Thereupon the present motion was made by the plaintiff and the defendant Edward F. Lynch.

J. F. McCreary, for plaintiff and defendant Edward F. Lynch, and motion.

Bernard J. Tinney, for defendant Mary Lynch, individually, as administratrix of estate of Daniel Lynch, and as general guardian of the defendants Angela and Joseph Lynch.

LAWRENCE, J.—This is a motion to set aside an *ex parte* order made by me on the 12th of January last, directing the city chamberlain to pay certain moneys held by him for the benefit of three infants to the administratrix of one, and the general guardian of the other infants. The

Flynn v. Lynch.

motion is made on behalf of the plaintiff and one of the adult defendants in the action.

The action was brought for the partition of certain real estate in the city of New York, and final judgment therein was entered on the 7th day of August, 1891. There is no dispute about the facts. The property was sold pursuant to the judgment, and the shares of the three infants, Daniel Lynch, Angela Lynch and Joseph Lynch, were deposited with the city chamberlain to be invested in permanent securities pursuant to the directions of the final decree, which was in the usual form in such cases.

The principal share of each infant amounted to \$2075.75, which was deposited with the chamberlain in two sums. The first deposit was made by the referee after the purchaser took title, being in the sum of \$1814.70. Under an order entered in the suit after the final judgment the referee had been directed to deposit the sum of \$6500.00, part of the proceeds of the sale, with the United States Trust Company to secure the claims of creditors of John Lynch, deceased, who was the owner of the property at his death. The parties to this suit were his heirs at law and widow. After the creditors' claims were ascertained, a surplus remained, and the share of each of the infants in such surplus was \$261.05, which formed the second deposit made with the Chamberlain to their credit.

After the sale and the first deposit was made, namely, on April 1st, 1892, Daniel Lynch, one of the infants, died, unmarried, at the age of eighteen. On January 8th, 1894, the defendant, Mary Lynch, his mother, was appointed administratrix of Daniel by the Surrogate of New York, and on the same day she was also appointed general guardian of Angela and Joseph.

On January 12th, 1894, on her petition as such administratrix and guardian, the affidavit of her attorney, the certificates of the city chamberlain showing the

Flynn v. Lynch.

amounts held for the respective infants, and the certificates of the clerk to the surrogate's court that letters had been granted to her, she procured the order now sought to be vacated.

The petition here sets forth the fact of her appointment as administratrix and general guardian, the amount of the infants' shares, and the petitioner's desire to procure the fund held for the respective infants. The affidavit of the attorney merely proved the amount of security, namely the personal security of two bondsmen given by the petitioner on her appointment as administratrix and as guardian.

By a clerical error made by a clerk in the Surrogate's office, the penalty of the bond in the matter of the guardianship of Joseph is for only \$400, whereas it should have been \$4000.

It is conceded by the counsel for the administratrix and guardian that the security as to such infant is insufficient, and it is consented that the order in question should be vacated or modified in respect to Joseph Lynch's share.

It is, however, contended on the part of the moving party that the order of January 12th, 1894, in so far as it is directed the payment of the fund for account of the deceased infant, Daniel Lynch, to his administratrix was unauthorized and improper, and that the administratrix had no right to the fund or its custody or possession.

It is settled that where real estate owned by tenants in common, of whom an infant is one, is sold under and in pursuance of a judgment in partition instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate (*Horton v. McCoy*, 47 N. Y. 533).

On Daniel's death, and before attaining majority, therefore, the fund descended as real estate to his heirs at law (cases *supra*).

Flynn v. Lynch.

It is contended, however, that the provisions of section 2359 of the Code of Civil Procedure, as amended by Laws of 1892, chapter 523, sanction the order so far as it directs payment of Daniel's share to his administratrix.

I do not concur in that view, inasmuch as that section relates to title 7, chapter 17 of the Code of Civil Procedure, providing for the sale of real property of an infant where the personal property and income of the real property of the infant are insufficient for the payment of his debts, or for the maintenance and necessary education of himself and family, etc. That amendment did not relate to the sale of the infant's share in real estate in a partition suit, nor change the rule laid down in the cases above referred to. And, besides, that amendment appears merely to contemplate the retention of the funds by the trustee after the funeral expenses, and expenses of administration, and indebtedness have been paid.

In this case there was no money in the hands of a trustee, and it does not appear that any expenses had been incurred by the administratrix.

In order to properly construe the amendment to section 2359 of the Code of Civil Procedure, made by chapter 523 of the Laws of 1892, it is necessary to look at another act—chapter 558 of the Laws of 1892, which amends section 1581 of the Code of Civil Procedure. That section is contained in article 2 of chapter 14 of the Code, and relates to the shares of infants in property sold in actions for partition. It provides, as amended, that where a party entitled to receive a portion of the proceeds is an infant, the Court may direct it to be invested in permanent securities, at interest, in the name and for the benefit of the infant; or it may direct it to be paid over to the general guardian of the said infant when the guardian shall have executed to such infant a bond, with two sureties, which shall be approved by the Court; or that, if

Flynn v. Lynch.

any of the moneys arising from the proceeds of such sale shall have been paid to the county treasurer, and on proof that such money has remained uninvested in permanent securities for the space of three months may direct the same to be paid to the general guardian of such infant upon his giving an undertaking in an amount and with sureties satisfactory to the court for the faithful execution of his trust.

In this case the court has by its final judgment directed that the shares of the infants be paid into court to be invested in permanent securities at interest, in the names and for the benefit of said infants, and it appears that the chamberlain has invested all but a small portion of those shares in such securities.

It is, therefore, apparent that the money has not remained uninvested in permanent securities for the space of three months, which is one of the cases in which, under section 1581 of the Code of Civil Procedure, as amended, the court may direct the infant's share to be paid to the general guardian. I, therefore, see no necessity for transferring the corpus of the estate to the general guardian of the two surviving infants.

And it has already been sufficiently shown, I think, that the administratrix of the deceased infant is not entitled to the fund, the judgment being in a partition action and, therefore, not covered by section 2359 of the Code of Civil Procedure, as amended by Laws of 1892, chap. 523. Furthermore, the amendment of section 1581 apparently confides to the discretion of the court the question as to whether the money shall be paid to the general guardian or remain as invested by the county treasurer or chamberlain.

The Court having already exercised that discretion by its judgment, the order heretofore made appears to have been improvidently granted. If these views of the statute

Biershenk v. Stokes.

amending the two sections of the Code of Civil Procedure, above referred to, are correct, it is unnecessary for me to examine the question of security provided for by the general rules, nor whether rule 54 or rule 59 should be applied in determining the amount of security which a general guardian should give before he can receive funds arising from the sale of the real estate of an infant. Settle order no two days' notice.

BIERSHENK, *et al*, APPELLANTS, v. STOKES,
RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, APRIL,
1894.

§§ 539, 540, 1294, 3193.

*Variance between pleading and proof—appeal—when interlocutory decision
not received.*

In an action for work, labor and services, alleged to have been performed by plaintiff, and materials alleged to have been furnished by plaintiff at defendant's request, proof of the performance of work and of the furnishing of materials for one who was a sub-contractor of a firm, who had contracted with the defendant for the construction of a building, and that the defendant had agreed to retain a sum of money which would accrue to the contractor under his contract and to apply it towards the payment of the plaintiff's claim, upon the completion of the work undertaken by him, does not prove the cause of action set forth in the complaint, but on the contrary disproves it, and there is a material variance between the complaint and the proof for which the complaint is properly dismissed.

To constitute error for which a judgment will be reversed, it must appear that the error operated to the appealing parties prejudice or disadvantage.

Biershenk v. Stokes.

A plaintiff upon an appeal from a judgment dismissing his complaint, cannot review an interlocutory judgment overruling a demurrer taken by him to a counter-claim contained in the answer, and granting leave to reply thereto on payment of costs, of which leave he has never taken advantage, where upon the trial the defendant abandoned the counter-claim and took judgment merely dismissing the complaint. The plaintiff is not aggrieved by such interlocutory judgment, and in so far as the judgment omits all award to the defendant upon his counter-claim: it is in the plaintiff's favor.

(Decided April, 1894.)

Appeal by the plaintiff from a judgment or the general term of the city court of New York, affirming a judgment of dismissal entered at a trial term of said court.

The facts are stated in the opinion.

Henry Cooper, for plaintiff, appellant.

Ernest Hall, for defendant, respondent.

BISCHOFF, J.—The complaint was for work, labor and services performed and materials furnished at defendant's request, and the answer, besides generally denying the allegations of the complaint, interposed as a counter-claim a claim for damages alleged to have accrued to defendant out of plaintiff's unauthorized filing of a notice of lien claimed pursuant to the provisions of the Mechanics' Lien law (Laws 1885, ch. 342). A demurrer to the counter-claim was sustained at special term, but on appeal to the general term of the court below was overruled. Defendant thereupon caused final judgment in his favor to be entered upon the decision of the general term. Upon appeal to this court that judgment was reversed as unauthorized, the proper judgment upon a decision overruling a demurrer to part of an answer being an interlocu-

Biershenk v. Stokes.

tory one (*Biershenk v. Stokes*, 18 *N.Y. Supp.* 854, S. C. 46 *N. Y. St. Rep.*, 179). Pursuant to the directions in the judgment of this court an interlocutory judgment overruling the demurrer and granting plaintiffs leave to reply to the counter-claim on payment of costs was thereupon entered at general term of the court below. With the conditions of the leave granted them plaintiffs never complied, and no reply to the counter-claim was ever served, so that at the time when this action was reached for trial in the court below, the counter-claim, assuming it to have been valid as such, stood admitted except as to the amount of defendant's alleged damages.

On the trial it appeared unchallenged, and from evidence which plaintiffs had themselves adduced, that the work, labor and services, and materials, for which they sought to recover in this action, were performed and furnished by them under a contract in writing which they had made therefor with one Owen Cumiskey, a sub-contractor of Squire & Whipple, with whom the defendant had contracted for the construction of certain buildings. It further appeared from plaintiffs' own showing, and from documentary evidence adduced by them, that the only contract they had with the defendant was one by which the latter had agreed to withhold \$2700 of the amount which would accrue to Squire & Whipple under his contract with them, and to apply the sum so to be withheld towards the payment of plaintiffs' claim against Cumiskey upon completion of the work undertaken by the former. When plaintiffs rested defendant's counsel moved that the complaint be dismissed for a failure of proof, and because of a fatal variance between the complaint and the proof. The trial Justice, intimating his concurrence in the views expressed by defendant's counsel, thereupon offered to allow plaintiffs to withdraw a juror and to apply for an amendment of the complaint.

Biershenk v. Stokes.

Plaintiffs' counsel, however, without asking for an amendment of the complaint to conform to the proof, declined to avail himself of the offer made. Thereupon the complaint was dismissed. Judgment for dismissal of the complaint was entered in defendant's favor, from which plaintiffs appealed to the general term of the court below, where it was affirmed, and from the judgment of affirmance plaintiffs have again appealed to this court.

Observing the rule that the recovery must in every case be *secundum allegata et pratoba* (Romeyn v. Sickles, 1 Silvernail Ct. App. 594, S. C., 108 N. Y. 650) it is indisputable that the ruling of the trial Court in granting the motion of defendant's counsel for dismissal of the complaint was correct. The cause of action which appeared from the evidence was widely different from the cause of action alleged in the complaint and was susceptible of widely different defenses. There was, therefore, not only a variance between the complaint and the proof, and an entire failure of proof, but the cause of action alleged was disproved (Arnold v. Angell, 62 N. Y. 508).

Nor can appellants on this appeal secure a review of the interlocutory judgment of the general term of the Court below which overruled their demurrer to defendant's counter-claim. Section 3193 of the Code of Civil Procedure provides that section 1294 shall be applicable to appeals from the city court to this court, and section 1294 confers the right of appeal only upon a party or parties "aggrieved." How can the appellants be said on this appeal to be "aggrieved" by the interlocutory judgment? Presumably acting upon the suggestion of this court on the occasion of the first appeal that the facts relied on in the answer do not constitute a proper counter-claim in this action defendant abandoned his counter-claim on the trial. No proof of his alleged damages was made or offered on the trial, and no part of the relief awarded to

 Martin Cantino Co. v. Warshauer.

defendant by the interlocutory judgment is included in the judgment appealed from. By the abandonment of his counter-claim on the trial, and the entry of final judgment for dismissal of the complaint only, defendant has waived whatever rights were secured to him by the interlocutory judgment. Appellants have, therefore, no cause for complaint.

To constitute error for which a judgment will be reversed it must appear that the error operated to the appealing party's prejudice or disadvantage.

In so far as the judgment appealed from omits all award to defendant upon his counter-claim, it is in appellants' favor (*Hughes v. Stickey*, 13 *Wend.*, 280; *Idley v. Bowen*, 11 *Id.* 227; *Reid v. Vanderheyden*, 5 *Cow.* 719; *Hall v. Brooks*, 89 *N. Y.* 33; *Steele v. White*, 2 *Paige*, 478; *Kellett v. Rathbun*, 4 *Id.* 102; *Kelly v. Israel*, 11 *Id.* 147; *Hackley v. Hope*, 4 *Keyes* 123; *Bush v. Rochester City Bank*, 48 *N. Y.*, 659).

Judgment affirmed with costs.

BOOKSTAVEN, P. J., and PRYOR, J., concurred.

 MARTIN CANTINE CO. v. WARSHAUER.

SUPREME COURT, THIRD DEPARTMENT, ULSTER COUNTY,
SPECIAL TERM, MARCH, 1894.

§§ 14, 1776, 2281, 2284.

Contempt—Interposing false answer is—punishment—pleading—denial of incorporation.

A defendant in an action who by verifying and serving a false answer delays the recovery of judgment therein against him until after other creditors have obtained judgments against him and sold his property under execution, is guilty of an abuse of a proceeding of

Martin Cantine Co. v. Warshauer.

the court, which impeded if it did not defeat, the rights of the plaintiff and may be punished as for contempt of court.

Moffat v. Herman (116 N. Y. 181) distinguished.

A denial in an answer of any knowledge or information sufficient to form a belief as to whether the plaintiff is a domestic corporation, does not state any defense, not being an affirmative denial of plaintiff's incorporation, and, therefore, will not on the ground that it alone would occasion the delay defeat a motion to punish the plaintiff for contempt in verifying and serving a false answer, which by delaying the plaintiff's recovery of judgment defeated or impaired his remedy.

Concordia Savings and Aid Asso. v. Read (93 N. Y. 474) followed.

Where, if an answer had not been interposed in an action, the plaintiff would have recovered judgment at a time when the defendant had sufficient leviable property to pay it, and the defendant by verifying and serving a false answer delayed the recovery of judgment until after all his property had been seized and sold under executions issued by other creditors—*Held*, that he was guilty of a contempt of court, and should be fined the amount of the judgment and the costs of the proceedings to punish him therefor.

(*Decided March, 1894*).

Motion by plaintiff to punish defendant for contempt in verifying and serving a false answer.

The opinion states the facts.

Charles F. Cantine, for plaintiff and motion.

F. J. Bischoff, for defendant, opposed.

PARKER, J. An examination of the papers on which this motion is based and opposed leads irresistibly to the conclusion that the verified answer interposed by defendant was false; and that he had full knowledge of its falsity.

What his object was is suggested by the fact that, a few days after the defendant had thus successfully checked the plaintiff's march towards a judgment, he confessed judgment in favor of the J. E. Linde Paper Company in the sum of

Martin Cantine Co. v. Warshauer.

\$1243.63, upon which, as well as upon a judgment obtained against him the day following for \$715.04, executions were issued, and certain property of the defendant sold, realizing between \$1000 and \$1100, a portion of which amount was applied in payment of each of these judgments, as appears by the return of the sheriff.

It is difficult to conceive of any greater contempt of court than to block the proceedings in court by perjury, and it seems to be specifically provided for in section 14 of the Code of Civil Procedure, which provides that "a court of record has power to punish . . . misconduct by which a right or remedy of a party to a civil action or special proceeding pending in a court may be defeated, impaired, impeded or prejudiced, in either of the following cases: . . . (2) A party to the action or special proceeding for putting in fictitious bail, or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the Court."

A pleading is a proceeding of the Court; in this case a proceeding to which the defendant was not entitled. The facts did not warrant it. It was only by perjury that he obtained the use of it; and thus, in the language of the subdivision quoted from, there was "abuse of a . . . proceeding of the Court," which in this case impeded, if it did not defeat, the rights of the plaintiff, a party to a civil action.

This question was not passed on in *Moffat v. Herman*, (§ 116 *N. Y.* 131*) because on another ground it became necessary to affirm the judgment of the general term, which reversed the order of the Court below adjudging a party guilty of contempt in verifying and interposing a false answer. It appeared that the fine imposed was in excess

* *S. C.* 17 *N. Y. Civ. Pro.* 357, *affg.*, 17 *Abb. N. C.* 107, *revs'g*, 8 *N. Y. Civ. Pro.* 369.

Martin Cantine Co. v. Warshauer.

of that authorized by section 2284 of the Code of Civil Procedure, which governs the extent of a fine that may be imposed upon one who has been adjudged to have been guilty of a contempt of Court within the provisions of section 14.

It is urged on this motion that, even if the Court finds that the defendant verified and interposed an answer which alleged false matter by way of defense, still he may not be punished, because the answer contained one averment which was not false, and which put the plaintiff to his proof, and, therefore, the delay which resulted would have occurred had the false defense not been set up. One difficulty with defendant's contention is that the averment upon which he relies did not put in issue the allegation in the complaint. The complaint alleged the incorporation of the plaintiff under the laws of the State of New York. The answer "denies any knowledge or information sufficient to form a belief" as to such allegation. This allegation was not sufficient to require plaintiff to make proof of the existence of the corporation, because section 1776 of the Code distinctly provides that such proof need not be made except where the verified answer contains the affirmative allegation that the plaintiff is not a corporation. The attempted denial in defendant's answer is not an affirmative allegation that the plaintiff is not a corporation. *Concordia Savings Aid Assn. v. Read*, 93 N. Y. 474.

This brings us to the question of punishment. Section 2281 of the Code provides when and how a party adjudged guilty of contempt shall be punished, and section 2284 fixes the limits within which a Court may measure out the fine to be imposed. It provides that, "if an actual loss or injury has been produced . . . a fine sufficient to indemnify the aggrieved party must be imposed; . . . where it is not shown that such an actual loss or injury has been produced, a fine must be imposed not exceeding the

Martin Cantine Co. v. Warshauer.

amount of the complainant's costs and expenses, and \$250 in addition thereto."

If, then, the evidence requires the finding that the plaintiff did sustain actual loss, and affords a basis for a determination of the extent of that loss, the last sentence quoted is not applicable, and the previous one, which requires a fine sufficient to indemnify the aggrieved party is. Now, it appears that on the 8th day of December, 1893, the plaintiff moved this case for trial at the Ulster circuit, and obtained a judgment for damages and costs in the sum of \$626.03. Had the answer not been interposed, he would have been entitled to a judgment on the 12th day of November, 1893, at which time it appears the defendant had property subject to levy and sale under execution greatly exceeding in value the amount of plaintiff's judgment, and he continued to have a leviabie interest in property of a greater value than such judgment for at least ten days after plaintiff would have been entitled to enter his judgment but for the misconduct of the defendant. The evidence, therefore, requires the finding that, but for the interposition of the false answer, the plaintiff would in the ordinary course, have made the amount of his judgment out of defendant's property.

Compliance with the requirements of the statute, therefore, makes it necessary to impose upon defendant a fine equal in amount to the face of the judgment with the costs of this proceeding added, which are fixed at the sum of \$50.

Let an order be entered accordingly.

Brady v. Nally

BRADY, APPELLANT, v. NALLY, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL
TERM, APRIL, 1894.

§§ 539, 540.

Variance between pleading and proof—when material.

When an answer sets up as a counter-claim, a cause of action for plumbing materials and labor alleged to have been furnished by defendant to plaintiff, amounting to \$4496.60 and the proof showed a contract for \$11,000 embracing besides plumbing materials and labor, gas-fitting, sewer-excavating and labor connected therewith, of which contract price there remained unpaid the sum of \$4469.66,—*Held*, that there was a variance between the pleading and the proof, and that a finding sustaining the cause of action proved, necessitated the reversal of the judgment, and a new trial of all the issues. /

A party cannot allege one thing and prove and recover on another. He must prevail according to the case made by his pleadings, or not at all.

(Decided April 2, 1894.)

Appeal by the plaintiff from a judgment entered upon the report of a referee.

The facts are stated in the opinion.

William H. Arnoux, (Arnoux, Ritch & Woodford,
attorneys), for plaintiff, appellant.

Henry Steinert, for defendant, respondent.

GILDERSLEEVE. J.—The plaintiff appeals from the judgment rendered herein, so far as it relates to the allowance of a certain counter-claim. The counter-claim was set up in the answer as follows, *viz.*:

Brady v. Nally.

"And, for a further and third counter-claim to said plaintiff's claim herein, the defendant alleges that at divers times between the 16th day of May, 1888, and the — day of —, 1888, this defendant, at the special instance and request of the plaintiff herein, furnished to said plaintiff plumbing materials and labor, at the school-house, situated on the northeasterly corner of Ninety-sixth Street and Lexington Avenue, in the City of New York, and that said materials and labor have amounted to the sum of \$4495.60, but no part of said sum has been paid."

Under this allegation, which claims an indebtedness for plumbing material and labor of the value of \$4495.60, the referee has found a contract for \$11,000, embracing, besides plumbing materials and labor, gas fittings, sewer excavation, and pipes for sewers and gas, and labor connected therewith; and the referee has found, further, "that the plaintiff has failed to pay the defendant for work performed and materials furnished under said contract, as in and by said contract provided, amounting to the sum of \$4496.66." The evidence discloses that the work actually done consisted, in part, of putting in a sewer and blasting on three different drains. So far as appears, the work and materials not paid for, and for which an award is made in excess of plaintiff's claim, might not have included any plumbing material and labor whatever.

It will not do to allege one thing, and then prove another, and be allowed to recover thereon. The rule is correctly stated in *Abbott's Brief on Pleadings* (section 1027, p. 802), as follows: "A party, whether plaintiff or defendant, must prevail according to the case made by his pleadings, or not at all, *secundum allegata* as well as *probata*." See *Wright v. Delafield*, 25 N. Y. 266; *Day v. Town of New Lots*, 107 N. Y. 148; *Delany v. Van Derveer* 7, N. Y. Supp. 132.

The findings of fact do not sustain the allegations of

Smith v. Smith.

the answer in respect of the counter-claim under consideration. The proper remedy is a reversal of the entire judgment, and a new trial of all the issues. *Goodsell v. ———* Tel. Co. 109 N. Y. 147.

Judgment reversed, and a new trial granted with costs to abide the event.

SEDGWICK, C. J., and DUGRO, J., concurred.

SMITH v. SMITH.

SUPREME COURT, THIRD DEPARTMENT, SARATOGA COUNTY,
SPECIAL TERM, JANUARY, 1894.

§ 1229.

Divorce—entry of judgment in action tried before referee.

The provisions of the Code of Civil Procedure that in a matrimonial action, tried before a referee, no judgment shall be entered without a direction by the court, does not authorize a review by the special term of the report of the referee, but simply authorizes the court to intervene and prevent a judgment where it would be plainly erroneous.

Where the issues in a matrimonial action have been fully and fairly tried before a referee appointed to hear and determine, his decision should stand as a guide to the court in rendering the judgment, unless some unjust, inadvertent or unwise ruling appears, which tends to undermine the safeguards which the court throws around the indissolubility of the marriage ties, and in such case alone should the special term intervene.

In such an action an error of law should be reviewed not by the special term, but by the general term.

(Decided January, 1894.)

Application by defendant for confirmation of report of referee appointed to hear and determine issues in action for divorce.

Smith v. Smith.

The opinion states the facts.

J. L. Henning and *Myer Nussbaum* for defendant and motion.

Charles F. Doyle for plaintiff, opposed.

RUSSELL, J.—A motion is made to confirm the report of a referee appointed to hear and determine the issues in an action of divorce on the ground of adultery, in which there was an affirmative defense of adultery on the part of the defendant, and a counter-claim of the same issue, asking for an affirmative judgment in favor of the defendant.

The reference was to Judge Houghton, of Saratoga Springs; and after hearing the evidence, voluminous in its character, the referee reported in favor of the defendant: Firstly, that he had not committed adultery; and secondly, that the plaintiff had committed adultery, and awarded a divorce to the defendant.

Upon the motion to confirm the report, the plaintiff's counsel objects that the evidence was insufficient to justify the finding that the defendant had not committed adultery, and also that there was no sufficient evidence to support the finding that the plaintiff had committed adultery. The Court at special term is therefore asked by the plaintiff's counsel to review the findings of the referee, both upon the merits and for errors committed upon the trial in rulings upon evidence, in order to reach the result that the motion to confirm the report should be denied.

Section 1228 of the Code of Civil Procedure provides that the report of a referee to hear and determine shall stand as a decision of the Court; and upon it, as a matter of course, a judgment may be entered, without further application to the Court, upon the merits.

Smith v. Smith.

But section 1229 modifies this provision in matrimonial actions so as to require that the judgment itself shall be rendered by the Court. It is obvious that the intent of the legislature, in this variance in such actions, was simply to provide that no judgment in such actions should ever be rendered without a direction by the Court, and the purpose of this rule is also obvious. It is against public policy that the marriage contract should be dissolved by agreement, honest or collusive. The principle which protects this relation carries its necessity into every form of procedure in Court in divorce actions, even where a referee to hear and determine has been appointed by the Court in a divorce action, and one cannot be appointed without the order or direction of the Court; and his decision is not the final judgment, but, for the protection of the policy of the public in its respect for marriages, the Court itself must be satisfied that the divorce is fairly granted. Otherwise, a referee who is appointed to hear and determine might feel compelled, upon the evidence presented, to award a divorce, while the Court which has to pronounce the judgment, in its broader scope and power, might interpose its veto; so that, notwithstanding there was *prima facie* evidence of adultery, sufficient having appeared upon the trial or by proof *aliunde* to justify it, it might refuse to award judgment. All of this is not intended as a review by the special term of the report of a referee of limited power, as in ordinary cases of that kind, nor is it intended to stand for an appeal to the general term from the referee's decision, or judgment entered on the referee's decision, where all of the questions arising before the referee can be properly heard and determined. It is simply an authority to the Supreme Court to intervene, and prevent a judgment from being entered which would justify the consummation of a new marriage by the successful party, and the complications arising from the existence of a judgment

Smith v. Smith.

which might be plainly erroneous. The principle alluded to would not require the Court to scrutinize closely the evidence, where the decision of the referee was against any divorce, for in such cases the marriage is protected and preserved.

Therefore this Court, in the case at bar, will not consider the conflicting evidence and inferences arising upon the referee's finding that the defendant had not committed adultery, as such a review is not within the scope of the meaning of section 1229, or the reason upon which it is founded.

The plaintiff's counsel asks the Court to review the affirmative finding in favor of a divorce for the defendant on the ground that there is not sufficient evidence to justify the finding of such a legal conclusion. This presents a somewhat different question from the antecedent one. In the original issue upon which the order of reference was made, there was an affirmative counter-claim, as well as the defense, of adultery on the part of the plaintiff. It was not sufficiently broad, and the Court, pending the hearing upon the reference, allowed a supplemental answer averring adultery by the plaintiff, committed after the commencement of the action. As the testimony had largely been given showing the acts of adultery by the plaintiff prior to the service of the supplementary answer, the plaintiff's counsel now claims that this evidence could not be used in support of the supplementary answer without being re-given. His objection does not go upon this argument to the extent that the supplementary issue destroyed the force of the order of reference. This evidence was competent and proper, if not for an affirmative decree of divorce in favor of the defendant, at least for the purpose of destroying plaintiff's power to procure a divorce from the defendant; she being also a guilty party, even if he was also. When the supplementary answer was given, the evidence in the

Fraser v. Granite State Provident Association.

case might apply to all of the issues arising upon the pleadings. This was so held by the referee, and, if he has committed an error in this respect, that error should be reviewed by the general term upon appeal, instead of the special term in pronouncing judgment in this action.

Where the issues have been fully and fairly tried before a referee to hear and determine, his decision should stand as a guide for the court in rendering judgment, unless some unjust or inadvertent or unwise ruling appears, which tended to destroy the safeguards which the court throws around the indissolubility of the marriage tie. In such a case, and such case alone, should the special term intervene. I think this doctrine is a reasonable one, and is also sustained by the authorities. *Schroeter v. Schroeter*, 23 *Hun*, 230; *Ryerson v. Ryerson*, 7 *N. Y. Supp.* 726; *Ross v. Ross*, 31 *Hun*. 140; *McCleary v. McCleary*, 30 *Hun*. 154; *Matthews v. Matthews*, 53 *Hun*. 244.

Judgment is therefore ordered for the defendant, in accordance with the conclusion of the referee.

FRASER, *et al*, APPELLANTS, *v.* GRANITE STATE
PROVIDENT ASSOCIATION, IMPLEADED, ETC.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL
TERM, APRIL, 1894.

§ 1775.

Pleading—averment of domicile of foreign corporation.

In an action against a foreign corporation, the failure to state in the complaint, the state, country or government by or under whose laws the defendant was created, as required by section 1775 of the code of civil procedure, is not a defect of substance, and cannot be taken advantage of by demurrer, but the remedy is by motion.

Fox v. Erie Preserving Co. (93 *N. Y.* 5), followed
(Decided April 2, 1894.)

Fraser v. Granite State Provident Association.

Appeal by the plaintiff from interlocutory and final judgments sustaining demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The opinion states the facts.

D. M. Porter, for plaintiff, appellant.

Phillip Carpenter, for defendant, respondent.

GILDERSLEEVE, J.—Plaintiffs allege in the complaint that the defendant, Granite State Provident Association “is a foreign corporation.” This defendant corporation demurred to the complaint upon the ground “that it does not state facts sufficient to constitute a cause of action against said defendant.” The Court below sustained the demurrer upon the ground that plaintiff’s omitted to alleged the state, country, or government by or under whose laws the demurring defendant was created. The Code of Civil Procedure (§ 1775) provides as follows :

“In an action brought by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation ; must state whether it is a domestic or foreign corporation, and if the latter the state, country or government by or under whose laws it was created.”

It is the contention of the respondent that the complaint omits an allegation required by law, and is, therefore, demurrable. A somewhat sharp conflict of authorities is presented by both special and general term decisions bearing upon the question we are here called upon to decide. We favor the authorities which support plaintiff’s claim, that the omission is of a formal allegation, which offers no ground for demurrer. The fact omitted does not go to the cause of action, and is, therefore, not demurrable.

Fraser v. Granite State Provident Association.

In *Fox v. Erie Preserving Co.* (93 N. Y. 54), the Court of Appeals say: "The allegation that defendant is a corporation is no part of the cause of action but simply relates to the character or capacity of the defendant." If the allegation as to the corporate character of the defendant may be omitted, and a cause of action still be stated, the defect under consideration, which is an omission to set forth the state, country, or government by or under whose laws the alleged foreign corporation was created, cannot be said to be one of substance, which can be taken advantage of by demurrer.

The cause of action herein is not dependent upon the fact whether the corporation is domestic or foreign; and, if foreign, it is immaterial to the cause of action to what state, country, or government the corporation is indebted for its existence. It is true that section 1775 of the Code entitles the defendant corporation to require the plaintiffs to advise it by statement in the complaint as to what was the state, country, or government by or under whose laws the corporation was created. But this right of the defendant corporation must be obtained by motion. *Laney v. Laney*, 11 N. Y. *Supp.* 319; *Rothchild v. Railway Co.* 10 N. Y. *Supp.* 36; *Furniture Co. v. Grumme*, 10 *Civ. Pro.* 176.

The final judgment, interlocutory judgment, and order sustaining the demurrer must be reversed, with costs, and the respondent permitted to answer on payment of costs within ten days after the entry of the judgment of reversal.

SEDWICK, C. J., and DUGRO, J., concurred.

Smith v. Ingham University.

SMITH, RESPONDENT v. INGHAM UNIVERSITY,
APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT. GENERAL TERM,
APRIL, 1894.

§ 998.

Appeal—effect of failure to make or file case.

An appeal cannot be dismissed because of the failure of the appellant to serve a case and exceptions within the time prescribed therefor and the only effect thereof is to leave the party to argue his appeal on the judgment roll.

The fact that a party has waived his right to have an appeal taken by him from a judgment heard upon a case, is determined under the rules and practice of the court, both where he omits to make a case and where he fails to file it after it is settled, by an order declaring the case abandoned, made at special term upon notice.

The practice where a case has been declared abandoned and the appellant fails to serve the papers upon which the appeal is to be heard stated, and the application of the special rule in the fifth department, requiring an affidavit that the case has been settled, signed and filed as a condition of filing a note of issue for the general term, explained.

(Decided April 12, 1894.)

Motion by plaintiff that this cause be stricken from the general term calendar and the judgment in favor of plaintiff, appealed from, affirmed.

The opinion states the facts.

Bowen & Washburn, for plaintiff. respondent, and motion.

Jaines Bros., for defendant, appellant, opposed.

HAIGHT, J.—So much confusion exists with reference to the disposing of appeals in the Court, on account of the

Smith v. Ingham University.

delay in the prosecution thereof, that we have thought it wise to restate the practice,

An appeal cannot be dismissed on account of the failure of the appellant to serve a case and exceptions within the time prescribed therefor. The only effect of such omission is to leave the party to argue his appeal on the judgement roll. *Schwarz v. Weber*, 103 N. Y. 658; *Berger v. Dubernet*, 7 Robt. 1; *Brown v. Hardie*, 5 id. 678; *Rankin v. Pine*, 4 Abb. Pr. 309.

Rule 33 provides that: "If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice, surrogate or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed."

Rule 35 provides that: "Where a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, signed and ordered to be filed, or it shall be deemed abandoned unless the time is extended by order. . . . And on filing affidavit that such case or exceptions has not been filed and showing the time of the settlement thereof, and the date of such order, and that more than ten days have elapsed from the time of such order, or from the expiration of the time to which it was extended, an order of course, may be entered declaring the same abandoned and the party may proceed as if no case or exceptions had been made."

It will be observed that under rule 33, if the party shall omit to make a case within the time limited, he shall be deemed to have waived his right thereto, and that under rule 35, if he omit to file the case, when settled, within the time limited, he shall be deemed to have abandoned it. As

to the former, the rule does not point out how the waiver is to be determined, but in the latter, the rule specifically provides how the question of abandonment shall be established. No reason is apparent why the practice provided for the determination of the question in one case should not prevail in the other. The courts have consequently adopted the practice prescribed by rule 35, in determining the question of waiver under rule 33. *Carraher v. Carraher*, 42 *How. Pr.* 458; *Phelps v. Swan*, 2 *Sweeny*, 696; *Ward v. Railroad Co.* *Id.* 701; *Anon.* 36 *How. Pr.* 366; *Insurance Co. v. Dwight*, 1 *Hilt.* 50.

Rule 40 provides that: "Enumerated motions shall be noticed for the first day of the term by either party on a notice of eight days. . . . The party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon trial of issues of law, at least eight days before the time for which the latter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and on four days' notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument) and that judgment be rendered in his favor."

The practice, therefore, is, if the appellant fails to serve his case, or have it settled, signed, or filed within the time prescribed by the rules, the respondent may apply, on notice, to the special term, to have the case declared waived or abandoned in accordance with the provisions of the rules 33 and 35. If the special term grants the motion, the appellant may still have his appeal heard upon the judgment roll, by causing the papers to be printed and served in accordance with the provisions of rule 40. After the entry of an order declaring the case and exceptions waived or abandoned, the respondent may notice the case for argument, and place it upon the calendar; and, if the

Smith v. Ingham University.

appellant neglects to serve upon the respondent the papers upon which the appeal is to be heard within the time prescribed, the respondent may move on affidavit, and on four days' notice of motion, that the case be struck from the calendar, and that judgment be rendered in his favor.

In the city of New York it has been the practice to require the respondent to apply to the court, or a judge thereof, for an order to put the case on the calendar, in accordance with a special rule to that effect existing in such city. But we have no such rule in this department.

We have, however, a special rule which provides that: "In every case which is to be brought on for argument upon a case or a case containing exceptions, the note of issue filed with the clerk shall be accompanied by an affidavit stating that the case has been settled, signed and filed, and specifying the time and place of such filing; otherwise the case shall not be put upon the calendar."

This rule has reference only to causes which are to be heard upon a case, or a case containing exceptions and has no application to an appeal which is to be heard upon the judgment roll alone. After an order has been entered declaring a case, or a case containing exceptions, waived or abandoned, the cause may be placed upon the calendar, and no affidavit is required to accompany the note of issue.

The special term has power to excuse and open defaults, and to extend the time to make and serve case or case containing exceptions, and all motions of this character should be made in that Court.

The motion should be denied, but, in this case, without costs to either party.

DWIGHT, P.J., LEWIS and BRADLEY, JJ., concurred.

Haas v. Swick.

HAAS v. SWICK, *et al.*SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY,
SPECIAL TERM, FEBRUARY, 1894.

§ 653.

Attachment—within what time indemnity bond should be given or property delivered to claimant

Where property valued at \$14,500 levied upon under an attachment was claimed by a third person and the title thereto was found to be in the claimant, and within forty-eight hours thereafter the plaintiff gave a bond of indemnity with two sureties, who each made affidavit that he was worth over \$60,000 over and above all liabilities,—*Held*, that the bond of indemnity was given in time, and that a motion to compel the sheriff to deliver the property to the claimant should be denied, and another motion that he be required to file bond and serve a copy with notice of justification upon the claimant should be granted.

The word "forthwith" in section 658 of the Code of Civil Procedure requiring that the sheriff forthwith deliver such attached property to claimant in whom the sheriff's jury has found the title, unless the plaintiff gave an undertaking, means within a reasonable time, without unreasonable delay and with due diligence under the circumstances of the case.

New York Central Insurance Co. v. National Ins. Co. (20 Barb. 468), *Inman v. Western Fire Ins. Co.* 12 Wend. 45), *Bennett v. Lycoming & Erie Ins. Co.* (67 N. Y. 274, followed.

(Decided February 5, 1894.)

Motion by Ettie Swick, claimant, that the sheriff of the city and county of New York be directed to deliver property levied upon by him under an attachment, and claimed by her, to her; also motion by the plaintiff that the said Sheriff be required to accept the undertaking of indemnity given by them and file the same in accordance with the statute.

The facts sufficiently appear in the opinion.

Hass v. Swick.

S. B. Stiles, for plaintiff.

James Murphy (Campbell & Murphy, Attorneys), for
Ettie Swick, claimant, etc.

LAWRENCE, J.—In this case there are two motions. One is by third party claimants, claiming the delivery to them of certain property levied upon by the Sheriff, under and by virtue of a warrant of attachment issued in this action, on the grounds that a Sheriff's jury has found the title to the goods claimed by them to be in the claimants, and on the further ground that no bond or undertaking of indemnity has been given to the Sheriff. The second motion is made by the plaintiff to compel the Sheriff to accept the undertaking which, he claims, has been given by him, and to file the same in accordance with the statute.

The proper disposition of these motions involves a construction of section 658 of the Code of Civil Procedure as amended by the Laws of 1888.

That section provides, in substance, that if by their inquisition the jury find the property of the goods or effects to have been in the claimant at the time of the levy, the sheriff must forthwith deliver them to him or his agent, unless the plaintiff gives an undertaking, with sufficient sureties, to indemnify the sheriff for the detention thereof.

The section also provides that if the undertaking is given, the sheriff must detain the goods or effects, as the property of the defendant; and in the county of New York, where an undertaking is given to indemnify the sheriff, he must within two days after the giving of the said undertaking cause the same to be filed in the office of the court out of which the attachment was issued, and serve upon the claimant or his agent, and the attaching creditor or the attorney whose name is subscribed to the warrant of attachment, a

Haas v. Swick.

copy of the said undertaking, with a notice of the justification of the sureties thereon.

It is then provided that the justification must take place before a judge of the court out of which the attachment was issued at a time to be specified in the notice, which must be not less than two, nor more than five days after serving the said notice.

The remainder of this section provides as to the procedure on said examination, and it is not necessary to be recited for the purpose of disposing of these motions.

It is conceded in this case that the sheriff's jury found the property levied upon to be in the claimants on the 15th of January, 1894, and it appears by the plaintiff's affidavits that a bond of indemnity was furnished to the Sheriff by the plaintiff on the 17th of January, 1894, with two sureties each making affidavits that he was worth \$60,000 over and above all his liabilities; and as the property levied upon is shown by the affidavit on behalf of the plaintiff to have been worth \$14,500 in all, it is claimed by him that the bond furnished good and ample security to the sheriff for all damages that he might sustain by reason of the detention of the goods; and that it was the sheriff's duty, within two days thereafter, to cause the same to be filed and to have given to the claimant the notice of justification required by section 658 of the Code.

It will be observed that the section under consideration, if the property is found in the claimant, provides that the sheriff must forthwith deliver the goods to the claimant, unless the plaintiff gives an undertaking, etc.

The word "forthwith" does not necessarily mean at the very instant of the rendition of the verdict of the sheriff's jury. It means within a reasonable time; without unreasonable delay; with due diligence under the circumstances of the case.

In *New York Central Ins. Co. v. National Protection*

Mussinam v. Hattan.

Ins. Co. (20 Barb. 468), where the policy required notice of loss to be given forthwith, and the insured knew of the loss on the 18th, and sent notice to the insurers by mail on the 23d, the notice was held to be a sufficient compliance with the condition of the policy (see to the same effect, *Inman v. Western Fire Ins. Co.* 12 Wend. 452, and particularly *Bennett v. Lycoming and Erie Ins. Co.*, 67 N. Y. 274).*

The bond having been given in this case within forty-eight hours of the rendition of the verdict of the sheriff's jury, I think that the requirements of the Code were satisfied, and that it then became the duty of the sheriff to file the same and to give notice of justification.

I shall, therefore, direct the filing of the bond, and that notice of justification of the sureties be given as required by section 658 of the Code of Civil Procedure.

Settle order on notice.

MUSSINAM v. HATTAN.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM, APRIL, 1894. ~

§ 542.

Complaint—right to amend of course.

Where before answer to the original complaint in an action, the plaintiff served an amended complaint which was stricken out upon motion of the defendant, and thereafter the defendant answered the original complaint, and the plaintiff thereupon served another amended complaint,—*Held*, that this second amended complaint must be stricken out; that a party has the right to amend his

* See collection of cases considering the meaning of the word "forthwith" in 8 *Amer. and Eng. Enc. of Law*, p. 571.

Mussinam v. Hattan.

pleading, but once of course, subject to the power of the court to strike out for cause shown, and after having exercised that right, he cannot amend without application to the court.

It seems that an amended complaint cannot be stricken out, on the ground that it sets up a new cause of action not stated in the original complaint.

(Decided April 21, 1894.)

Motion by the defendants for an order striking out the amended complaint served herein as unauthorized and improper.

This action was brought to recover certain chattels, alleged to belong to the plaintiffs. The original complaint herein was served December 15th, 1893, and an amended complaint was served January 18th, 1894, and on February 2, 1894, a motion made by the defendant that it be stricken out on the ground that it plainly and entirely changed the cause of action and set up matters which had occurred since the commencement of this action was granted unless the defendant should elect to regard the amended complaint as a supplemental complaint. This the defendants refused to do, and on February 8th, 1894, an order was entered striking out the said amended complaint. Thereafter, on March 9th, the defendants answered the original complaint, and on March 22d the plaintiff's attorneys served another amended complaint. Defendant thereupon made this motion.

Foley & Powell, for defendants and motion.

Peters & Robinson, for plaintiff, opposed.

GILDERSLEEVE, J.—This is a motion to strike out an amended complaint. Before service of the answer to the original complaint the plaintiff served an amended complaint which was subsequently stricken out by the Court, on motion

Mussinam v. Hattan.

of defendant. After the amended complaint had been so stricken out, the defendant served his answer to the original complaint, and within twenty days thereafter plaintiff served another amended complaint. The defendant now moves to strike out this second amended complaint.

The question here presented is: Can the plaintiff serve two amended complaints; that is, when the first amended complaint has been stricken out, can plaintiff serve a second complaint, as of course, without costs and without prejudice under section 542 of the Code? That section of the Code permits a pleading to be amended "once by the party of course, without costs, and without prejudice to the proceedings already had," etc., "within twenty days after the pleading, or the answer or demurrer thereto is served, or at any time before the period for answering it expires," etc.

This second amended complaint was served within twenty days after service of the answer to the original complaint, and was, therefore, served within the statutory limit of time (*Seneca Bank v. Garlinghouse*, 4 *How. Pr.* 174).

But, having already served one amended complaint, can plaintiff serve another under the above section of the Code? I think not. The Code particularly states that the complaint may be once amended. The Code gives plaintiff an absolute right to amend his complaint once, subject to the right of the Court to strike out for cause shown (*Cooper v. Jones*, 4 *Sand.* 699; *Frank v. Bush*, 2 *N. Y. Civ. Pro.* 250). The plaintiff has availed himself of this right, and his amended complaint has been stricken out by the Court. He cannot go on serving amended complaints indefinitely.

I can find no authority to support the contention that plaintiff can serve a second amended complaint, as a matter of right, under section 542 of the Code.

Of course, under section 544 of the Code, plaintiff is at liberty to apply to the Court for permission to serve a

Shepherd v. Squire.

supplemental complaint; but I am of opinion that he has already exhausted his rights under section 542 of the Code.

The ground, however, that the proposed amended complaint should not stand for the reason that it sets up a new cause of action, is not tenable; for, under section 542 of the Code, the plaintiff may amend by alleging an entirely new cause of action, because this section contains no restriction as to the nature of the amendments (*Robertson v. Robertson*, 9 *Daily*, 44-52; *Devine v. Ducan*, 2 *Abb. N. C.* 328); but all the causes set forth in the amended complaint should be of the same class and of a class to which the summons is appropriate (*Brown v. Leigh*, 49 *N. Y.* 78).

I am of opinion that the motion to strike out this second amended complaint must be granted with \$10 costs, with leave to the plaintiff to make such application to the Court as he may think proper with regard to any further pleading.

SHEPHERD, *et al*, APPELLANT *v.* SQUIRE, *et al*,
RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,
APRIL, 1894.

§§ 984, 986.

Place of trial—what is proper—right of parties to change of.

An action relating to land situate without this State, is one which must be tried in the county in which one of the parties resided at the time of the commencement thereof.

Where one of the plaintiffs in an action brought in Monroe County resided without the State and two of them resided in Herkimer County and all of the defendants resided without the State,—

Shepherd v. Squire.

Held, that the defendants were entitled to a change of the place of trial from Monroe to Herkimer County; that the fact that the defendants were non-residents of the State did not deny them the benefit of the statute providing that an action must be brought in the county wherein one of the parties resided, nor does the words, "one of the parties" necessarily embrace all the plaintiffs or all the defendants when they, respectively, consist of more than one person, but in that case, each of the persons is a party plaintiff or defendant and the import of the language used is the same as if it read, "an action must be tried in the county in which one of the persons, who is a party, resided."

The right to a change of the place of trial of an action to the proper county, is absolute, when proceedings to accomplish it are duly taken and pursued.

A demand that the place of the trial of an action in the Supreme Court, be changed to the proper county, served after answer to the original complaint herein, but before answer to an amended complaint is effectual to support a motion for a change of the place of trial.

Penniman v. Fuller & Warren Company (22 N. Y. Civ. Pro. 205), followed.

(Decided April 12, 1894).

Appeal by the plaintiffs from an order of the Monroe County Special Term, changing the place of trial of this action from Monroe County to Herkimer County.

This action was begun May 8th, 1893, by the service of a summons without a complaint, the defendants appeared, and on June 22d, the complaint was served upon their attorney, by mail. Before serving any pleading, the defendants on July 5th, served a written demand that the place of trial be changed from Monroe County, which was the county designated in the summons and complaint as the place of trial, to Herkimer County. On July 20th, they served their answer, and with it, they served another written demand, for a like change of the place of trial. On July 21st, they served affidavits and a notice of motion returnable July 31st, for such a change of place of trial. This motion was heard, and in September was denied

Shepherd v. Squire.

having been prematurely made, but with leave to renew. While this motion was under consideration, on August 18th, 1893, the defendants served affidavits and notice of motion returnable September 11th, for a change in the place of trial founded upon their second demand, but before the hearing of that motion, an amended complaint was served, and thereafter before answering said amended complaint, the defendants served another written demand for a change of the place of trial, and gave notice that they withdrew the second motion noticed by them. Thereafter they answered the amended complaint, and also served affidavits and notice of motion founded upon the third demand returnable October 30th, 1893, for an order changing the place of trial. This motion was heard and granted at a special term, held in Monroe County, and from the order thereupon entered this appeal was taken.

John Van Voorhis, for plaintiff, appellant.

A. H. Mills, for defendant, respondent.

BRADLEY, J.—The defendants were at the time of the commencement of this action and are, residents of the State of Washington. The subject of the action is land situate in that State. The plaintiff King is, and for several years has been, a resident of the State of Minnesota. The place of residence of the other plaintiffs is Illion, in the County of Herkimer, N. Y.

This action comes within those to which is applicable the statute which provided that an action "must be tried in the county in which one of the parties resided at the time of the commencement thereof." *Code Civ. Pro.* § 984.

And because none of the parties resided in the county of Monroe, and two of the plaintiffs then resided in the county of Herkimer, the demand for the change to the

Shepherd v. Squire.

latter, as the proper county, was made. The defendants' attorney, not being served with written consent thereto, gave, within due time, notice of motion, founded upon his third demand, for such change of the place of trial.

The fact that the defendants were non-residents of the state does not deny to them the benefit of the statute referred to, for the purpose of proceeding in the manner so provided for changing the place of trial to the proper county.

Nor are the words "one of the parties," in section 984, entitled to such construction as to necessarily embrace all the plaintiffs or all the defendants, when they, respectively, consist of more than one person. In that case each one of the persons is a party plaintiff or defendant, and the import of the language used is, in view of its purpose, the same as if it read that "an action must be tried in the county in which one of the persons who is a party resided." Although the phraseology of the section differs somewhat from that of section 125 of the prior Code, no material change in its meaning was intended, as appears by the Throop's notes, and its apparent effect is no different.*

The right to the change of the place of trial to the proper county is absolute, when the proceedings to accomplish it are duly taken and pursued.

But it is urged on the part of the plaintiffs that the third demand did not constitute a basis of support for the motion, because it was served before the defendants answered the amended complaint, and after the answer to the original complaint. It is conceded that they may have effectually served a demand with the answer to the amended

* The *Code of Procedure*, § 125, provided for trial "in the county in which the parties, or any of them, shall reside at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county, which the plaintiff shall designate in his complaint."

Shepherd v. Squire.

complaint. It may be observed that, when it was served, the amended one became the only complaint in the action, as effectually as if none had preceded it; and, for the purpose of proceeding to require and obtain a change of the place of trial, the defendants were at liberty to so treat it. The demand made before answering it was therefore effectual to support their motion made in due time thereafter.

In *Penniman v. Fuller & Warren Co.* (22 *N. Y. Civ. Pro.* 205), the demand served with an amended answer to the complaint was held sufficient basis for a motion like the one in question. That case does not aid the plaintiffs. Here the amended one was the complaint, within the meaning of the statute referred to; and before answering, as well as with it, the defendants may properly have demanded the change of the place of trial.

There was no waiver, by any proceedings taken prior to the service of this demand of the right of the defendants to proceed upon it. They had, before the service of the amended complaint persistently sought to obtain the change. It is difficult to see that one such demand would be waived by another of like character preceding or following it.

In the present case the proceeding was instituted by a demand permitted and authorized by the service of the amended complaint, and the motion was properly granted. The order should be affirmed.

DWIGHT, P. J., LEWIS and HAIGHT, J. J., concurred.

Bradley & Currier Co. v. Herter.

BRADLEY & CURRIER COMPANY, LIMITED,
v. HERTER *et al.*

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM ; APRIL, 1894.

§§ 970, 974.

Trial—motion to state issues for.

Where in an action to foreclose a Mechanic's Lien, a defendant sued as owner of the property, served an answer denying the material allegations of the complaint, and setting up a counter-claim for damages for breach of the contract set forth in the complaint, to which the plaintiff's served a reply consisting of a general denial, and the case was noticed for trial by the plaintiffs, and appeared on the special term calender on April 6th, and was then set down for trial on April 17th, and said defendant, who had not noticed the cause for trial, on April 9th obtained an order to show cause returnable April 12th, why issue should not be framed for trial by jury.—*Held*, that the defendant had not waived his right to trial by jury by laches; that rule 31 of the General Rules of Practice, providing for service of notice of motion to frame issues within ten days after issue joined did not apply to this case, which was within the provision of section 970 and 972 of the Code of Civil Procedure.

In an action to enforce a Mechanic's Lien, it is imperative on the Court to grant an application seasonably made for trial by jury of questions of fact arising on a counter-claim for damages.

(Decided April 17, 1894.)

Motion by defendant Frank W. Herter, that the issues of fact arising upon the pleadings herein as to which said defendant is entitled to a trial by jury be distinctly and plainly stated for trial by jury.

This action was brought to foreclose a Mechanic's Lien, for \$2561.97 claimed by plaintiff upon certain

Bradley & Carrier Co v. Herter.

property belonging to the defendant Frank W. Herter for materials alleged to have been furnished said defendant by plaintiff.

The defendant Herter served an answer in which he denied the material allegations of the complaint, set up a counter-claim for \$1500 as damages alleged to have resulted to him because of the plaintiff's failure to complete the contract set forth in the pleadings, and upon this claim he demands judgment against the plaintiff.

The other defendants, two in number, also served answers, setting forth liens claimed by them upon the defendant Herter's property.

At the time of noticing this motion, the cause had been noticed for trial by plaintiff, and had been set down for trial on April 17th. The motion was made upon an order to show cause obtained April 9th returnable April 12th, 1894.

Martin J. Keogh, for defendant, Herter, and motion.

Austin E. Pressinger, (*Otis & Pressinger*, attorneys) for plaintiff, opposed.

Frank Baker, for defendants, Appell and Brose.

GILDERSLEEVE, J.—The action is brought to foreclose a mechanic's lien. The defendant Herter served an answer denying material allegations of the complaint, and setting up a counter-claim for damages to said defendant by reason of plaintiff's failure to complete the contract set forth in the complaint. The plaintiff served a reply denying the allegations of the counter-claim. Notice of trial was served by the plaintiff for the special term, and the cause appeared on the special term calendar on April 6th instant, and was

Bradley & Currier Co. v. Herter.

set down for trial for April 17th. On April 9th, defendant Herter obtained an order to show cause, returnable April 12th, why issues should not be framed for trial by jury. It is this motion that is now to be determined.

In an action to enforce a mechanic's lien, it is imperative on the court to grant an application, seasonably made for trial by jury of question of fact arising on a counterclaim for damages (see *Deeves v. Metropolitan Co.*, 6 *Misc.* 91).

The plaintiff, however, contends that defendant has waived his right to a trial by jury by reason of laches, and plaintiff's counsel cites *Mackellar v. Rogers* (109 *N. Y.* 468, affirming 52 *N. Y. Super.* 468), in support of his contention. But I hardly think that case can be held to apply to this motion, because in that case it was held that defendant had waived his rights, for the reason that he had himself noticed the cause for trial at special term, and did not make his motion for a jury trial until the cause was reached for trial at the special term. In the case at bar, the defendant is not guilty of either of these acts of waiver.*

*** NOTE ON WAIVER OF TRIAL BY JURY.**

The code provides, "that a party may waive his right to the trial of the issues of fact by a jury, in any of the following modes: (1) By failing to appear at the trial. (2) By filing with the clerk a written waiver signed by the attorney for the party. (3) By an oral consent in open court entered in the minutes. (4) By bringing the trial of the action without a jury; or if the adverse party so moves it, by failing to claim a trial by a jury before the production of any evidence upon the trial" (*Code Civ. Pro.* §1009.)

The provision of the constitution reserving the right to a jury trial, declares that "it may be waived by the parties in all such cases in the manner to be prescribed by law." (*Constitution, Article 1, §2.*)

The Court of Appeals has held, that a waiver of the right of trial by jury may be adjudged upon any evidence sufficient to constitute a waiver of rights in other cases, that the parties have waived their

Bradley & Currier Co. v. Herter.

Nor do I think that Rule 31 of the General Rules of Practice sustains plaintiff's position, for that applies only to cases where the trial of issues of fact is not provided for

right to such a trial by their conduct or silence, although the case is what is provided for in the statute. *Baird v. Mayor*, 74 *N. Y.* 382.

The following are some of the cases in which it has been held that a jury trial was waived:

Where the defendant after a reference was ordered, did not appeal and proceeded with the trial without objection. *Baird v. The Mayor*, 74 *N. Y.* 382.

Where a jury trial was not demanded, and a trial before the court was proceeded with. *Herrington v. Robertson*, 71 *N. Y.* 280; *Penn. Coal Co. v. Delaware & Hudson Canal Co.* 3 *Abb. Ct. of App.* Dec. 470 *S. C.* 1 *Keyes* 72.,

By the plaintiff where he demands equitable relief, but the plaintiff's waiver does not deprive the defendant of his right to demand a jury trial, *Davison v. Associates, etc.*, 71 *N. Y.* 333 affirming 6 *Hun.* 470; *Ward v. Plato*, 23 *Hun.* 402; *People v. Del. & Susq. R. R. Co.* 5 *Laus* 25, *Aff'd in part*, 57 *N. Y.* 161; *Brady v. Cochrane*, 11 *Weekly Dig.* 255; *Shenfield v. Bernheimer*, 53 *St. Rep.* 383; *S. C.*, 17 *N. Y. Supp.* 881.

By the joinder of an equitable cause of action with others purely legal, but in such case the defendant may demand a jury. *Wheelock v. Dee*, 74 *N. Y.* 495; *S. C.* 5 *Abb. N. C.* 72; *Hand v. Morris*, 36 *N. Y.* 50, *aff'g* 36 *Barb.* 227 72. See also *S. C.* 64 *N. Y.* 242.

Where the defendant demanded a jury trial when the case was called for trial, and the Court reserved its decision, by thereafter going to trial, without insisting upon a ruling upon the question as to the right to a jury trial. *Hand v. Kennedy*, 83 *N. Y.* 149, affirming *S. C.*, 45 *Super. Ct.* 385.

By voluntarily proceeding with a trial although a demand for a jury has been made and denied, *Gearson v. Kettellaa*, 17 *N. Y.* 491 *aff'g S. C.* reported as *Newcomb v. Kettellaa* 19 *Barb.* 608; *Moffett v. Moffett*, 10 *Bosw.* 468 *S. C.* as *Moffett v. Mount*, 17 *Abb. Pr.* 4; *McKeon v. See*, 4 *Rob.* 449.

By allowing the plaintiff to open his case before a judge without a jury without objection. *People v. Delaware & Susquehanna Railroad*, 5 *Laus.* 26 *aff'g* 7 *Abb. Pr. N. S.* 265, *S. C.* 1 *Laus.* 308, 55 *Bosw.* 344 and 38 *How. Pr.* 228.

By failing to appear. *Hendricks v. Carpenter*, 4 *Robert.* 665 *aff'g Id.* 625; *S. C.*, 1 *Abb. Pr. N. S.* 213.

By deferring demand for jury trial until close of plaintiff's testimony. *McKeon v. See*, 51 *N. Y.* 300, applied in *Nason v. Luddington*, 8 *Daly*, 149.

Bradley & Currier Co. v. Herter.

by the code, and the motion here under consideration is covered by the provisions of sections 970 and 974 of the code.

The motion is granted, without costs.

By proceeding to trial with it. *Black v. White*, 37 *Superior Court* 320; *Kelley v. Dusenbury*, 42 *Superior Court*, 238; *Whittelsey v. Delaney*, 73 *N. Y.* 571; *Derham v. Lee*, 42 *Superior Court*, 174.

By deferring objecting until after the commencement of the trial: *Kenney v. Apgar*, 93 *N. Y.* 539; *O'Brien v. McCarthy*, 71 *Hun*, 427.

By the defendant as to a counter-claim interposed by him, by noticing the case for trial at special term. *McKellar v. Rogers*, 109 *N. Y.* 468 aff'g 9 *N. Y. Civ. Pro.* 6.

By consenting that a case called for trial at circuit go over to be tried at a subsequent special term: *Third National Bank v. Shields*, 55 *Hun.* 274; *S. C.* 26 *St. Rep.* 505; 8 *N. Y. Supp.* 298.

By failing to object to a trial at special term. *Stono v. Weiller*, 128 *N. Y.* 655.

It has been held that this right is not waived by placing the cause on the special term calendar and failing to apply for settlement of issues. *Morrell v. Morell*, 17 *Hun.* 324.

Nor by consenting that a cause consisting of several causes of action, one of them purely legal, be placed on the special term calendar and noticing it for trial there. *Wheelock v. Lee*, 5 *Abb. N. C.* 72 *S. C.*, 74 *N. Y.* 495.

Nor by appearing and proceeding under a compulsory reference: *Brink v. Republic Fire Ins. Co.* 2 *Sup. C. T. & C.* 550 *Abb. Pr. N. S.* 338.

Nor by proceeding with the trial of an action in form for equitable relief during the trial which is treated as a legal action to recover damages: *Bradley v. Aldrich*, 40 *N. Y.* 504.

Nor by excepting to findings made upon a trial without a jury: *Fasnacht v. Stehn*, 53 *Barb.* 650, *S. C.*, 5 *Abb. Pr. N. S.* 338.

Nor by cross-examining witnesses after a jury trial has been demanded and denied: *Zoller v. Groht*, 21 *Weekly Dig.* 325.

Nor by failing to comply with General Rule of Prac. 31: *Conderman v. Conderman*, 44 *Hun.* 181.

Merrick v. Hill.

MERRICK, AS EXECUTRIX OF THE LAST WILL AND
TESTAMENT OF MELZER F. MERRICK, DECEASED
v. HILL AND ANOTHER.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM,
APRIL, 1894.

§§ 539, 540.

*Variance between pleading and proof—objection when necessary
—res adjudicata.*

An objection to evidence on the ground that it is incompetent and immaterial, is not sufficient to sustain the point taken on an appeal that the evidence was not within the issues raised by the pleading.

A non-suit is not a determination of a cause of action upon the merits, and does not become a bar to any action.

The propriety of the receipt in evidence of a deed of real property as showing a transfer of the rents thereof, will not be reviewed on appeal, if it appears that plaintiff's right to recover remains unimpaired even if it was stricken out, because of an undisputed assignment of the rents.

(Decided April 12, 1894.)

Appeal by the defendants from a judgment of the County Court of Monroe County, affirming a judgment of the Municipal Court of the City of Rochester, rendered in favor of the plaintiff.

The facts are stated in the opinion.

N. J. Sullivan, for defendant, appellant.

N. D. Tucker, for plaintiff, respondent.

HAIGHT, J.—This action was brought to recover the sum of \$130, being the amount of rent due upon a lease of real estate.

Merrick v. Hill.

On April 1st, 1890, Moses Merrick leased to one Edward P. Hill certain premises in the city of Rochester and town of Gates, for one year next ensuing, at the annual rental of \$215, payable quarterly on the first days of July, October, January and April. Indorsed upon the lease is the following: "For value received, we do hereby guarantee the payment of rent of the foregoing premises, as hereinbefore agreed to be paid by said lessee, Edward P. Hill," dated Rochester, April 1st, 1890, and signed by the defendants in this action.

Upon the trial, the plaintiff introduced in evidence an instrument bearing date October 15th, 1891, signed by Moses Merrick, in which, after certain recitals, is the following: "Now, therefore, in consideration of the premises, and for value received, I hereby sell, assign and transfer to said Melzer F. Merrick all right and interest I may have in and to the said lease and guaranty and the rent thereby secured, if any interest I may have therein."

The trial court awarded judgment in favor of the plaintiff for the amount of rent due.

It is now contended that the assignment should not have been received in evidence, for the reason that it was not alleged in the complaint. The complaint does allege a transfer of the interest of Moses Merrick in the lease to Melzer F. Merrick, but it was alleged to have been by a deed, and no mention is made of the assignment. But no objection was made to its reception upon this ground. It was only objected to as incompetent and immaterial. The attention of the trial court was in no way called to the fact that it was not covered by the pleading, and consequently error cannot now be predicated upon its reception in evidence.

After the reception in evidence of the assignment, the defendants introduced a judgment roll, in which Moses Merrick was plaintiff and the defendants in this action were

Merrick v. Hill.

defendants, in which it appears that Moses Merrick had, previous to the assignment, brought an action against the the defendants for the same rent which is sought to be recovered by the plaintiff in this action. In that action the judgment was for the defendants.

It is now contended that it determined the rights of Moses Merrick, and that he had no interest in the lease which he could transfer to Melzer F. Merrick. But in that action the defendants introduced a deed in evidence, dated August 13th, 1890, in which Moses Merrick conveyed to Melzer F. Merrick in fee the leasehold premises. It appeared that all of the rent due upon the lease accrued and became due after such conveyance. The trial court entered a judgment of non-suit in that action. We presume, therefore, that the trial judge disposed of the case upon the theory that, Moses Merrick having conveyed his interest in the real estate, the rent thereafter accruing passed to his grantee. But, whether this be so or not, we deem it immaterial, for a non-suit is not a determination of a cause of action upon the merits and does not become a bar to another action. *People v. Vilas*, 36 *N. Y.* 459.

Upon the trial the plaintiff introduced in evidence a certified copy of the deed alluded to. This was objected to as incompetent and immaterial, and not the best evidence; that it is an attempt to prove title which is controverted; and that the court has no jurisdiction. The deed was, however, received, and after the plaintiff rested the defendant moved to dismiss the complaint on the ground that on the plaintiff's own showing the title to real estate is in question and disputed. This motion was denied.

The answer was a general denial, and a plea of payment. The defendants claimed that by the introduction of the deed in evidence it was made to appear upon the trial by the plaintiff's own showing that the title of real property was in question, and that it operated to oust the

Merrick v. Hill.

justice of jurisdiction (*Code Civ. Proc.* § 2956), and to sustain this claim our attention is called the case of *Lane v. Young*, 66 *Hun.* 563.

On the other hand, it is claimed that the title to real property was not put in issue by the answer; that rent reserved under a lease could be transferred to a person other than the owner of the fee; and that it was competent upon the trial for the plaintiff to show that Melzer F. Merrick had become the owner, and entitled to recover the rents accruing upon the lease; and that this could be done by any instrument in writing that showed the fact whether it was a deed, assignment, or other instrument; and that the title of real estate was not necessarily brought in issue.

But we do not deem it necessary to now determine this question, for, even if it should be conceded that the deed was improperly received, and should be regarded as stricken out, the plaintiff's right to recover would still remain unimpaired, for the assignment alluded to, of October 15th, 1891, is undisputed, and therefore conclusive upon the question of the ownership and of the right to recover the rents due and owing.

The judgment appealed from should be affirmed, with costs.

DWIGHT, P. J., LEWIS AND BRADLEY, JJ., concurred.

People of the State of New York v. Goldfogle.

PEOPLE OF THE STATE OF NEW YORK, *ex rel*
BALDWIN AND OTHERS, *v.* GOLDFOGLE, *AS*
JUSTICE OF THE DISTRICT COURT IN THE
CITY OF NEW YORK FOR THE FIFTH
JUDICIAL DISTRICT, AND ANOTHER.

§§ 1991, 2091, *et seq.*, 2231, *et seq.*, 2951, 2952.

Writ of prohibition—when not granted to restrain summary proceedings.

A writ of prohibition should not issue except in a case where the court has no jurisdiction, or it is proceeding in excess of its jurisdiction. The remedy for any error in the proceeding itself or for any wrongful decision by the justice is by appeal.

The provisions of the Code of Civil Procedure relating to the filing of an answer in an action in a district court, in the city of New York, putting in issue a question of title to land, and for the giving of an undertaking and the ousting thereupon of a justice of jurisdiction, are confined to actions, and do not relate to summary proceedings.

Matter of White (12 *Abb. N. C.* 348), followed.

Summary proceedings are not actions within the meaning of the provisions of the Code of Civil Procedure.

People v. Hamilton, (39 *N. Y.* 107), followed.

Where on the return day named in a precept issued in summary proceedings to recover the possession of real property, the persons named therein as tenants appear and tender an answer putting in issue a question of the title to the property, and also tender and ask the justice to approve of an undertaking in the form prescribed by sections 2951 and 2952 of the Code of Civil Procedure, and the justice refuses to accept the same, a writ of prohibition will not issue restraining the justice from hearing and determining the issue in the proceeding. He has the right to try the questions involved, which does not prevent him, should he deem it proper, in case a question of title appears upon the plaintiff's proof, from dismissing the proceedings.

In summary proceedings, the question is whether the relation of landlord and tenant exists; the question of title cannot arise, the one presented being as to the right to possession, and the decision simply determines who is entitled to possession, and does not in any way affect the title to land.

(Decided April 19, 1894.)

VOL. XXIII.—27.

People of the State of New York v. Goldfogle.

Hearing upon return to alternative writ of prohibition directing Henry M. Goldfogle, Justice of the District Court in the City of New York for the Fifth Judicial District or any Justice holding or to hold court in and for said Fifth Judicial District, and Josephine F. Clason to desist and refrain from any further proceedings in summary proceedings instituted in said court, wherein Josephine F. Clason is petitioner and Elizabeth S. Baldwin and others are defendants.

The petition upon which the alternative writ was issued set forth that the relators are defendants in a summary proceeding brought in the District Court in the City of New York for the Fifth Judicial District wherein the defendant Josephine F. Clason is petitioner, and, that the relators prepared an answer in said proceedings containing a plea of title, and tended the same with an undertaking drawn in accordance with sections 2951 and 2952 of the Code of Civil Procedure, and the Justice made a defendant herein, on the return day named in the precept refused to accept the plea of title or approve of the undertaking on the ground that the District Court had jurisdiction to try the same and set said cause for trial on March 15th. The relators asked that a writ issue prohibiting the defendant, Justice, from hearing such proceeding. The defendant, Goldfogle, filed an answer to the alternative writ setting forth the proceedings had before him which are substantially as stated in the petition for the writ, and also stating that the trial of summary proceedings had been adjourned by stipulation of counsel for both parties; also objecting pursuant to section 2097 of the Code of Civil Procedure to the sufficiency of the papers upon which the alternative writ was granted on the ground that the matter so set forth in said papers do not constitute a cause for the issuance of a writ of prohibition. The matter came to a hearing on an application upon the return day

People of the State of New York v. Goldfogle.

named in the alternative writ for an absolute writ of prohibition.

Isaac M. Miller, for relators and motion.

Cited in support of contention that a Justice of the District Court has no jurisdiction, *Code Civ. Pro.* §§ 2861, 2863, 2951, 2952, 2954, 3212; that the writ of prohibition is the proper remedy, *People v. McAdam*, 84 *N. Y.* 287; *People v. Nichols*, 97 *N. Y.* 258; *Quimbo Appo v. People*, 20 *N. Y.* 531; *Van Etten v. Van Etten*, 66 *Hun.* 499.

George W. Stephens, for defendants, opposed.

The provisions of the Code of Civil Procedure for setting up in an action in a Justice's court a plea of title have no application to summary proceedings, *Code Civ. Pro.* §§ 2951, 2952, 2954. *Matter of White* 12 *Abb. N. C.* 348. In any event the writ of prohibition should not issue. Even if the Justice has erred in his conclusion ample remedy will be afforded by appeal. Where such is the case the writ never issues. *Armstrong v. Crimmins*, 20 *Hun.* 317; *Wordsworth v. Lyon*, 5 *How. Pr.* 463; *People v. Parker*, 1 *N. Y. Civ. Pro.* 444; *People v. Steinberg*, 9 *Alb. L. Jour.* 411.

O'BRIEN, J.—The writ of prohibition is a State writ (*Code Civ. Pro.* § 1991), and, as stated in the note of the commissioner in Throop's Code, "it issues only to courts and judicial officers, acts only upon legal proceedings pending before those tribunals, almost invariably involves pure questions of law and aims only to procure a stay of proceedings."

As said by the commissioner: "It was thought that

People of the State of New York v. Goldfogle.

this writ had survived its practical utility, and that all the practical benefits of the writ might be obtained by means of an injunction. . . . The Laws of 1873, chapter 70, provided for the extension of the power to issue the writ of prohibition as well as the writ of mandamus." Although retained, therefore, the writ is confined in a narrow field of operation.

In speaking of this writ, *McAdam on Landlord and Tenant* (2d Ed., p. 205), says: It "may be defined as an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is the remedy afforded by the common law against the encroachments of jurisdiction by inferior courts and is used to keep such courts within the limits and bounds prescribed for them by law." And, on page 706, that author says: "Where a petition in summary proceedings presents such a case as the officer can consider, a writ of prohibition will not lie. The remedy of the tenant is to appear before the officer and either deny the facts set forth in the petition or move for its dismissal (*People v. McAdam*, 2 *N. Y. Civ. Pro.* 52). While the writ of prohibition issues to restrain a judicial tribunal from exercising jurisdiction in matters not within as well as those in excess of its cognizance, it has never intended that the writ should be used as a means of interfering with the orderly practice of the courts, or as a method of staying summary proceedings."

I do not understand that it is claimed that the Justice did not have the right to entertain the proceeding, or did not obtain jurisdiction by the filing of a proper petition, the claim being that he lost jurisdiction by the filing of the answer, which set up a question of title, and by the furnishing of an undertaking, pursuant to sections 2951 and 2952 of the Code. By the express terms of those

People of the State of New York v. Goldfogle.

sections they are confined to actions and not to summary proceedings, and this has been directly held in the Matter of White (12 *Abb. N. C.* 348). Summary proceedings, are not actions, within the meaning of the Code, and this was held as long ago as the case of *People v. Hamilton* (39 *N. Y.* 107)—a case arising prior to the present Code. In the present Code the sections applicable are classified under the head of "Certain Special proceedings Instituted Without Writ."

It is true that provision is made for the filing of an answer, by which, under the amendment of 1893 (chap. 705), the tenant or defendant is permitted to set up any legal or equitable defense, and for the trial of such issues by the judge unless a jury trial is demanded. These state a practice with respect to summary proceedings entirely unlike that provided by other sections of the Code for actions in Justices' Courts.

The question in summary proceedings is, whether the relation of landlord and tenant exists. The question of title cannot arise, the one presented being as to the right to possession, and the decision simply determines who is entitled to the possession, and cannot in any way affect title to land.

I think, therefore, that the Justice was correct in holding with the plaintiff that by the filing of the answer and the tendering of a bond he was not ousted of jurisdiction to try the summary proceedings, even though a tender of a plea of title to real estate was made. It is doubtful, however, in this case if even under the answer a plea of title was tendered. But whether it was or not, I do not regard it as sufficient to prevent the Justice from proceeding, he having jurisdiction to determine in such proceedings the question of possession.

The Justice has, therefore, a right to try the questions involved, which, however, does not prevent him, should he

Wintermeyer v. Sherwood.

deem it proper in case a question of title appears upon the plaintiff's proof, dismissing the proceedings.

In other words, the writ of prohibition should not issue except in a case where the Court has no jurisdiction, or is proceeding in excess of its jurisdiction. The remedy for any error in the proceeding itself, or for any wrongful decision or ruling of the Justice being by appeal.

My conclusion, therefore, is that the motion for the writ should be denied with costs.

WINTERMEYER, RESPONDENT, v. SHERWOOD, AS
EXECUTRIX OF HENRY A. SHERWOOD,
DECEASED, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
APRIL, 1894.

§ 1822.

Statute of limitations—when begins to run as to claim against decedent's estate—what rejection of claim is sufficient.

In a case where the claim consisting of independent items is presented to the representative of a decedent, one item may be admitted, and the remainder rejected, so as to set the short statute of limitations running as to those rejected.

Where a claim has been presented to the personal representative of a decedent and rejected, there is no occasion for a notice to that creditor to present his claim, and the short statutes of limitations begins to run as to it, although no notice has been published.

Solomon v. Heuchel, (4 Dem. Sur. 176), overruled. Field v. Field, 7 N. Y. 294, followed.

Where an executor or administrator directs an attorney to reject a particular claim against the estate, the rejection by the attorney is as effectual as though the executor or administrator was present and notified the claimant of the rejection.

Where three witnesses not interested in the result of an action, testified that items embraced in a cause of action were disputed or

Wintermeyer v. Sherwood.

rejected by the attorney for the defendant, who was the executrix of the will of the person against whom the claim existed, more than six months before the action was begun, and but one witness, the plaintiff himself, testified as to the contrary, and he admitted that the defendant refused to pay those items, and return to him his claim with his vouchers, more than six months before the action was begun, a finding that these items were not disputed or rejected is against the weight of evidence.

The presentation to an executrix and the rejection by her of a second claim against the estate of her decedent more than six months after the rejection of some of the items in another claim presented to her, is not a waiver of any rights acquired by the first rejection. (*Decided April 13, 1894.*)

Appeal by the defendant from a judgment for \$1218.56 and costs entered in favor of the plaintiff upon the report of a referee.

This action was commenced November 18th, 1891, and was brought to recover upon two causes of actions, viz.: First, to recover \$1445, with interest thereon from June 1st, 1891, on a claim for moneys alleged to have been paid by the plaintiff for the defendant's testator, at his request between January 1st and June 1st, 1891, and, second, to recover the sum of \$2931.32 with interest thereon from May 17th, 1891, the alleged amounts of sundry loans asserted by the plaintiff to have been made by him to the defendant's testator between January 8th, 1889, and May 17th, 1890.

The answer served by the defendant consisted, first, of a general denial of the facts constituting the two causes of action; second, of payment by defendant's testator, and third, the presentation by the plaintiff, and the rejection by the defendant of the claims in suit more than six months before the commencement of this action.

It appeared on the trial that the plaintiff's decedent, Henry A. Sherwood, died on June 1st, 1891, leaving a last Will and Testament which was duly admitted to probate, August 1st, 1890, and upon which, letters testa-

Wintermeyer v. Sherwood.

mentary were issued to the defendant, who, at once, qualified as such executrix, and entered upon the discharge of her duties.

The action was referred for hearing and determination to the referee, and the referee by his report, found, with respect to the first cause of action that the moneys there sought to be recovered were paid, not for the testator's benefit but in making repairs upon two houses owned by the plaintiff.

With respect to the second cause of action, the referee found that at divers times between April 14th, 1889 and April 22d, 1890, the plaintiff loaned the defendant's testator \$2261.70; that this loan was made by the drawing by plaintiff of fourteen checks to the defendant's testator's order, which were endorsed by him or by his direction, and the referee found against the plaintiff as to fifteen items of the second cause of action amounting in all to the sum of \$1592.62. Although the amount claimed in the complaint upon this second cause of action is \$3921.32, the items thereof as stated in the bill of particulars, and as sought to be proved upon the trial amounting to the sum of \$3821.32. The referee also found that the defendant's testator had, between June 1st, 1889, and May 16th, 1890, paid the plaintiff on account of the second cause of action \$1275, which being deducted from the said sum of \$2261.70 left a balance of \$986.70 due to the plaintiffs, for which amount with \$231.86 interest amounting in the aggregate to \$1218.56, judgment was directed in favor of the plaintiff and against the defendant with costs. The defendant duly excepted to the report of the referee and took this appeal.

James R. Marvin, for defendant, appellant.

Joseph C. Rosenbaum, for plaintiff, respondent.

FOLLET, J.—The plaintiff's second cause of action embraces twenty-nine independent items for money loaned on different dates, every one of which is contained in Claim No. 1, Exhibit C, presented by the plaintiff to the defendant in September or October, 1890.

This claim also included a promissory note for \$500, given by the testator to some person other than the plaintiff (which he had acquired) and other items not embraced in Claim No. 2, which was presented September 30th, 1891.

It is undisputed that in October or November, 1890, the defendant offered to pay the note, and afterwards did pay it, but refused to pay the other items of the claim. Notwithstanding the refusal to pay these items, the referee refused to find the following request, preferred by the defendant :

"Seventh. After the production of those checks, Mr. Marvin, in behalf of the defendant, and by her instructions, in the fall of 1890, informed the plaintiff personally that defendant, as executrix aforesaid, rejected his claim, and refused to pay it, and the claim was then disputed and rejected by defendant."

Construing this refusal by the referee's opinion, as this court may it is plain that the request was refused on the theory that part of the claim could not be admitted and paid and the remainder of the items rejected, so as to set the short statute running as to items so rejected.

The referee said in his opinion :

"The facts, so far as they relate to the short statute of limitations, are in substance as follows: In or about September, 1890, the plaintiff presented an account, unverified and without vouchers, to James R. Marvin, who was the attorney and counsel of the defendant and the estate she represented. Thereafter Mr. Marvin asked the plaintiff if he had any vouchers. In response to this

Wintermeyer v. Sherwood.

inquiry the plaintiff produced a number of checks, and left them with Mr. Marvin. Included in this original claim of the plaintiff was a note for \$500, which has become known in the case as the 'Hopfner Note.' Some time in October, 1890, Mr. Marvin informed the plaintiff that he could do nothing with the account; that the defendant disputed and rejected it. At the same time it appears that Mr. Marvin informed the plaintiff that the defendant would pay the Hopfner note. . . . The difficulty in this case, so far as the defendant is concerned, is that the whole claim originally presented was not rejected or disputed, the defendant conceding a part of it to be just, and offering at all times to pay it. To invoke the statute as to the original claim, the defendant should have absolutely disputed and rejected the whole claim, and then left the plaintiff to such remedy as he might see fit to pursue; and she should not, on the second presentation of a claim, have entertained it at all, and again rejected it. Not having done so, and having testified to a willingness at all times, down to presentation of the claims in September 1891, to pay the \$500 note included in the first claim, presented in 1890, the time within which the action might be brought had not run when the action was commenced."

The conclusion of law of the referee follows the opinion, and holds that the statute did not begin to run until September 30th, 1891.

The holding that, in case a claim which consists of independent items is presented to the representative of a decedent, one item cannot be admitted and the remainder rejected, so as to set the short statute running as to those rejected, does not seem to this court to be sound.

Such a rule would be inconvenient to claimants and to representatives, and would often prevent the former from being promptly paid demands conceded to be just; and, on the other hand, would expose estates to suits which could

be defended only in part. If some of the independent items of a claim cannot be admitted and paid and others rejected, so as to set the statute running as to the latter, the final settlement of estates can be indefinitely postponed by the presentation of claims partly just and partly unjust, which would necessarily delay final settlements, until the six-years statute had applied as a bar to the rejected claims, and defeat the very purpose of the short statute, which was passed to facilitate the early settlement of decedents' estates.

The record does not show whether the defendant has or has not published a notice to creditors to present their claims, and it was held in *Salomon v. Heichel* (4 *Dem. Sur.* 176), that, under section 1822 of the Code of Civil Procedure, the short statute does not run against a rejected claim unless the notice to present claims has been published. This seems to us to be a misconstruction of the section.

The object of the publication of a creditors' notice is to advise claimants when and where claims may be presented, and to enable estates to be promptly settled, and their representatives protected in payments which may be made.

If this section is to be literally construed, the statute would not run against a claim presented while a creditors' notice was being published. It reads: "Where an executor or administrator disputes or rejects a claim against the estate of the decedent, exhibited to him either before or after the commencement of the publication of a notice requiring the presentation of claims," etc. When a claim has been presented and rejected, there is no occasion for a notice to that creditor, and the short statute begins to run as to it though no notice has been published. *Field v. Field*, 77 *N. Y.* 294; *Code Civ. Proc.* § 1822.*

* "The notice is for the protection of the executors, and the estates which they represent, and there is no absolute obligation to

Wintermeyer v. Sherwood.

Three witnesses, not interested in the result of this action, testified that the items embraced in the second clause of action were disputed or rejected by the attorney of the defendant more than six months before this action was begun, and but one (the plaintiff) testified to the contrary, and he admitted that the defendant refused to pay those items, and returned to him his claim, with his vouchers, more than six months before the action was begun.

It seems to this court that the finding that the items recovered in this action were not disputed nor rejected in October or November, 1890, is against the weight of evidence, and that a new trial should be had, to the end that it may be found, not merely whether or not the entire claim originally presented was rejected (about which there is no dispute), but whether any or all of the items which this action is brought to recover were disputed or rejected in October or November, 1890.

When the representative of an estate directs an attorney to reject a particular claim, as in the case at bar, the rejection by the attorney for the representative is as effectual as though the representative had personally notified the claimant of the rejection. *Selover v. Coe*, 63 N. Y. 438.*

give it" *Field v. Field*, 77 N. Y. 294; *Brinker v. Loomis*, 43 Hun. 247; *Fliess v. Buckley*, 90 N. Y. 286, 292.

"Claims may be presented at any time after the executors qualify and enter upon the discharge of the discharge of their duties, and while they are entitled to a reasonable time to examine and decide upon the justice of claims presented, when they do decide, even though no notice has been published, the effect of their decision is the same as though the claim was presented after publication." *Field v. Field*, 77 N. Y. 294, 296. See also *in re Haxton*, 102 N. Y. 157; S. C.; 9 Civ. Pro. 197, where the object of the amendment of 1892 is stated.

* See also *Russell v. Lane*, 1 Barb. 519, 523. There it was held that it would be presumed that the attorney for the executor was authorized to refuse to refer the claim, notwithstanding the executor denied such authority, where it appeared that he was his counsel in all matters relating to the estate. See also *Clark v. Corwin*, 21 N. Y. Civ. Pro. 108.

Wintermeyer v. Sherwood.

The presentment and rejection of the second claim on the 30th of November, 1891,—more than six months after the rejection of some of the items in the first one,—was not a waiver of any rights acquired by the first rejection and the lapse of time.*

The judgment should be reversed on the law and the facts, with costs to the appellant to abide the event, and a new trial ordered before a referee to be appointed by the court upon the entry of the order anew.

VAN BRUNT, P. J. I concur, and think that the judgment should also be reversed because the referee assumed that the giving of a check imported a loan. Sternfield's evidence is conclusively shown to be utterly unreliable. The referee also erred in granting costs.

O'BRIEN, J., concurred.

KNOX, APPELLANT v. NOBEL, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
APRIL, 1894.

§ 2660.

Letters of administration—when decree granting, void—disaffirmance of contract by infant after attaining majority.

Where a surrogate selects a person as administrator, whom the statute says he shall not appoint, after having determined to appoint such an officer, his act is absolutely void.

The appointment by a surrogate of an infant as administrator of an estate is void, and may be attacked collaterally, and a contract

* The rejection must be distinct and the equivocal and unaccompanied by anything that would lead the claimant to infer that the dispute or rejection is not final or that a further examination or consideration will be given. Hoyt v. Bonnett, 50 N. Y. 538, rev'g 58 Barb. 529.

In Calanan v. McClure, 47 Barb. 206, a claim was presented to

 Knox v. Nobel.

made by him, while acting as such administrator, so far as it attempts to bind the estate, is also void.

While the decree of a surrogate made upon an application for letters of administration, is conclusive as to all the facts, and necessary for his jurisdiction, it imports nothing as the legibility of the person to whom the letters are issued.

Rodriguez v. Bank, 63 N. Y. 403; S. C. 76; N. Y. 316. Bolton v. Schriever, 70, distinguished. Carow v. Nowatt, 2 Ed. Ch. 58.

A person who, in a representative capacity, attempts to enter into a contract which he has no authority, is bound individually and for a minor may be held upon it, unless it is repudiated within a reasonable time after becoming of age.

Where a person is appointed an administratrix while a minor, and before reaching her majority enters into a contract, she may, after reaching her majority, maintain an action to avoid personal responsibility which would arise against her because of her entry into contract as administratrix without having the authority so to act.

Knox v. Nobel, (23 N. Y. Civ. Pro. 311), affirmed.
(Decided April 13, 1894.)

Appeal by the plaintiff from an interlocutory judgment of the New York County special term, overruling a demurrer to the complaint in this action.

The facts appear in the opinion.

Henry Hoyt, for plaintiff, appellant.

Lucien Birdseye, for defendant, respondent.

VAN BRUNT, P. J.—This action is brought by the plaintiff individually to set aside a sale attempted to be

executor in March, and rejected. The same claim with additions was presented in April with an offer to accept fifty cents on the dollar. The executor promised to see his attorney and let creditor know. The creditor asked for answer several times, but was put off, and finally, in October, the executor refused to pay or consent to a reference, —*Held*, that matter was held open and bar of statute did not attach.

In Miller's Estate, 9 N. Y. Supp. 60, Surrogate's Ct., Chautauqua Co., Dec., 1889, the rejection was not positive, but it was merely objected that another was morally responsible, the claim was subsequently considered and not regarded as finally rejected, as shown by fact that written notice of rejection was given more than a year thereafter.

Knox v. Nobel.

made by her as the administratrix of her deceased husband, upon the ground that at the time of granting the letters of administration she was a minor, and that the sale was made under the fraudulent representations and inducements of the defendants, and that the consideration paid was inadequate. The main question involved upon this appeal is whether letters of administration issued by the surrogate to a minor are or are not void. It is urged that as it is well established that the granting of letters of administration by the surrogate is conclusive as to his jurisdiction, the question as to the eligibility of the plaintiff to the office of administratrix cannot be inquired into collaterally.

We think that the question as to whether the plaintiff could legally be appointed administratrix of her deceased husband, she being a minor, has no relation whatever to the question as to the jurisdiction of the surrogate to grant letters of administration; and here is where the confusion has arisen.

An examination of section 2660 of the Code as it existed at the time of the issuing of the letters of administration in question will show that the eligibility of a petitioner to appointment as administrator has no connection with the facts upon which the jurisdiction of the surrogate's court to grant letters of administration upon the estate depends. The section says:

"A person entitled absolutely or contingently to administration upon the estate of an intestate may present to the surrogate's court having jurisdiction, a written petition duly verified, praying for a decree awarding letters of administration either to him, or to such other person or persons having a prior right, as may be entitled thereto, or in the alternative as the petitioner elects, and if necessary that the persons required to be cited as required in the next section but one may be cited to show cause why

Knox v. Nobel.

such decree should not be made. The petition must set forth the petitioner's title [it is clear that what is meant by this provision is the relationship under which the petitioner claims]; the facts upon which the jurisdiction of the court to grant letters of administration upon the estate depends; and the names of the husband or wife, if any, and of the next of kin of the decedent, so far as they are known to the petitioner or can be ascertained by him with due diligence."

It is thus seen that the facts upon which the jurisdiction of the court to grant letters depend do not include the petitioner's title, and were not intended to include the petitioners title, and are, by the very language of the section, excluded; and therefore, when it has been held that the grant of letters of administration is conclusive as to the surrogate's jurisdiction, it has only been decided that the granting of such letters is conclusive as to the facts upon which the jurisdiction of the court to grant letters upon the estate depend; and, as already seen, the petitioners title is not one of them, nor is the petitioner's eligibility to the office.

While, therefore, the decree of the surrogate is conclusive as to all the facts necessary for his jurisdiction, it imports nothing as to the eligibility of the person to whom the letters are issued. The statute expressly prohibits the granting of letters to a person convicted of an infamous crime, or to one incapable of making a contract, or to a person who is under twenty-one years of age, etc. Can it be said that the surrogate by his *ipse dixit* can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that any judicial officer can, by his mere will, override the express prohibitions of the statute.

The question of the age of this petitioner was in no

Knox v. Nobel.

respect presented to the surrogate for adjudication. No such issue was before him, and his jurisdiction to appoint an administrator did not depend upon any such inquiry ; and in this respect the case at bar differs from those of *Roderigas v. Bank*, 63 N. Y. 460, and 76 N. Y. 316, and *Bolton v. Schriever*, 135 N. Y. 70.

In those cases the question before the surrogate was as to his right to act at all, and, he having determined the question of jurisdiction, it was held that such adjudication could not be attacked collaterally.

The right of the surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void.

Such was the rule laid down in *Carow v. Nowatt*, 2 *Edw. Ch.* 58, in which it was held that, not only was the appointment of a minor void, but he could not be called to account for any portion of the estate which he had received.

It seems, therefore, reasonably clear that the appointment by the surrogate of the plaintiff was void, and that the contract, as far as the plaintiff attempted to bind the estate of her husband, was also void. But it is a familiar principle that a person attempting to enter into a contract in a representative capacity, having no authority to enter into such contract in such capacity, is bound individually ; and hence, even if this plaintiff had no authority to enter into the contract as the administratrix of her husband, because of the invalidity of her appointment, she would have been held individually had it not been for her minority ; and, even if the contract was entered into at a time when she was a minor, unless repudiated within a reasonable time after she became of age, she might be held upon it.

The plaintiff, by this action, comes into court, and
VOL. XXIII.—28.

Farrell v. Amberg.

seeks to disaffirm this contract, alleging that it was entered into while she was a minor, further alleging that it was obtained by fraud, and that she seeks to avoid the personal responsibility which would arise against her because of her entry into the contract as administratrix of her husband without having the authority so to act. It seems to us that she has a right to maintain this action to relieve herself individually from any claims which might be attempted to be enforced against her. The estate which she assumed to represent has no interest in this question. It is not bound by the contract, and is not at all interested in the question as to whether the plaintiff individually is or is not so bound. She alone is interested in the question as to whether she is to be liable to the defendants for damages in attempting to enter into a contract without authority.

We are of opinion, therefore, that the judgment should be affirmed, with costs, with leave to defendants to withdraw the demurrer, and, on payment of costs of court below and of this court, to answer.

FOLLETT and PARKER, JJ., concurred.

FARRELL, RESPONDENT, v. AMBERG, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, MAY,
1894.

§§ 514, 519, 522.

Pleading—construction of—reply when necessary—Revocation of power of attorney.

In constructing a pleading resort may be had to its several parts to ascertain what was intended to be alleged or denied, and only that which is fairly implied from the language used should be deemed alleged.

Section 519 of the Code of Civil Procedure, providing that pleadings are all liberally construed, applies only to matters of form, and

Farrell v. Amberg.

when a material statement in a pleading is susceptible of two or more different meanings, that which is most unfavorable to the pleader, should be accepted as the one intended.

Where defenses are properly pleaded as such, and also as off-sets, but are not available as counter-claims, the plaintiff is not required to reply to them in the absence of an order requiring a reply.

In the absence of an order requiring a reply no reply is necessary to mere new matter in avoidance or to matter constituting an off-set or recoupment or alleged as payment, and a failure to reply thereto is not an admission of the facts alleged therein.

Where an answer pleaded as a defense and counter-claim, the delivery of a contract, assignment and power of attorney for the purpose of securing the plaintiff against loss by reason of the fact that he had become surety upon a bond, and also for the purpose of repaying moneys advanced by him; that the power of attorney was revocable upon the reimbursement to plaintiff of the money so advanced and that it was revocable, but nowhere charged the plaintiff with receipt of any money in excess of the sums advanced, —*Held*, that while these facts might properly be pleaded as a defense and set-off they were not available as a counter-claim and it was not necessary that the plaintiff reply thereto.

An allegation in an answer that a power of attorney was revocable, and was revoked by service of notice of revocation, is a statement of legal conclusions and not of facts, and for that reason is not admitted because not denied in a reply.

An allegation in an answer of a conclusion is an immaterial averment and only material matters not controverted by answer or reply, should be taken as admitted.

Where a power of attorney is coupled with an interest being given to secure the attorney for money advanced by him, it is not revoked by the service of a notice of revocation, without reimbursing the attorney.

A power of attorney to collect a fund given to secure the payment of a debt due from the donor to the donee of the power, operates as an equitable assignment of the fund, and such assignment is none the less so, because the interest it conveys is equitable and conditional.

(*Decided May 7, 1894.*)

Appeal by the defendant from a judgment in favor of the plaintiff, entered upon the report of a referee.

The facts appear in the opinion.

Edward W. F. Johnston, for defendant, appellant.

Nelson S. Spencer, for plaintiff, respondent.

Farrell v. Amberg.

BISCHOFF, J.—This action was originally brought to recover the sum of \$7703.35, with interest, the balance claimed to be due from the Church of St. Francis of Assisi under a contract for the construction of its building. The church admitted the due performance of all the work, and its liability in the amount claimed, but asserted that one John L. Amberg has made claim to the moneys adversely to plaintiff. On notice to plaintiff and John L. Amberg, the original defendant was, by order, permitted to pay the moneys into court, and directed to be discharged as a party to the action, and said John L. Amberg was substituted in its place.

It is not disputed that the pleadings concede that on May 16, 1891, the Church of St. Francis of Assisi entered into a contract with one Henry H. Amberg, whereby the latter undertook to construct a building for a specified compensation to be paid him by the former, and that for the due performance of the contract on his part he executed and delivered his bond, with plaintiff as surety; that on July 14th, 1891, Henry H. Amberg assigned the contract to his brother, John L. Amberg; that on the same day John L. Amberg executed his power of attorney to plaintiff, whereby the latter was authorized, in the place and stead of the former, "to furnish, complete, and finish all the work, labor, and materials required to be done and furnished in and by" the building contract above mentioned, and "to collect or receive all moneys due or to become due on the said contract;" and that the contract, assignment, and power of attorney were delivered to plaintiff.

The complaint further alleges that the contract was assigned, and the power of attorney executed and delivered, "in pursuance of an agreement whereby the plaintiff agreed to furnish the money necessary to carry out said contract, and in his own name to make all the purchases

Farrell v. Amberg.

of materials, and to employ and pay all the labor necessary for the execution of said contract, and to complete and finish the work required to be done thereby." Also, that the assignment was made, and the power of attorney given to secure "the plaintiff all rights to receive the consideration named in said contract;" and that "the said assignment and power of attorney were executed and delivered instead of an assignment of said contract directly to the plaintiff, because of the existence of said bond, and to secure the defendant's rights thereunder."

The fourth paragraph of defendant's answer specifically admits, in almost identical language, the first above referred to allegation of the complaint, and "that the said assignment and power of attorney were executed and delivered, instead of an assignment of the contract, directly to the plaintiff, because of the existence of the said bond, and to secure the plaintiff's rights thereunder, as alleged in the paragraph of the complaint numbered 'Fifth;'" but denies that the power of attorney and assignment were made pursuant to a suggestion of counsel for the Church of St. Francis of Assisi, or prepared by him for the purpose of securing the plaintiff's rights in said contract.

The eighth paragraph of defendant's answer alleges "that the said contract was delivered and the said power of attorney was executed and delivered, to the plaintiff by the defendant because the plaintiff had become surety for the said Henry H. Amberg to the original defendant herein, the Church of St. Francis of Assisi, for the performance of said contract, and were executed and delivered for the purpose of securing the plaintiff's rights thereunder." Whereunder? Clearly, the contract; and any claim that "thereunder" refers to the bond is a palpable effort to distort the plain inference and grammatical sense of the language used. It is apparent, therefore, that the general denial at the conclusion of the paragraph,

Farrell v. Amberg.

as well as the denial that the assignment and power of attorney were made at the suggestion of counsel for the Church of St. Francis of Assisi, or prepared by him to secure the plaintiff's rights under the contract, were not intended to comprehend the second allegation of the complaint referred to,—that the assignment and power of attorney were made and given to secure “the plaintiff all rights to receive the consideration named in said contract.” The denial that counsel for the Church of St. Francis of Assisi suggested the execution and delivery of the instruments, or that he prepared them intending thereby to afford plaintiff security, are of immaterial matter in view of the admission that defendant in fact gave them for the purpose of such security.

In construing a pleading, resort may be had to its several parts to ascertain what was intended to be alleged or denied (*Whitney v. Town of Ticonderoga*, 6 *N. Y. Supp.* 844); and only that which is fairly implied from the language used will be deemed to be alleged (*Cook v. Warren*, 88 *N. Y.* 37; *Bank v. Van Rensselaer*, 6 *Hill* 240). Section 519 of the Code of Civil Procedure, which provides that pleadings shall be liberally construed, applies only to matters of form (*Clark v. Dillon*, 97 *N. Y.* 370); and, when a material statement in a pleading is susceptible of two or more different meanings, that which is most unfavorable to the pleader must be accepted as the one intended (*Clark v. Dillon*, *supra*; *Bunge v. Koop*, 48 *N. Y.* 225, 231).

It is doubtful whether the general denial at the conclusion of the eighth paragraph of the answer is at all available to defendant. *Baylis v. Stimson*, 110 *N. Y.* 621, 623.

The complaint also alleged that the work required to be done under the building contract had been fully and completely performed, and that the plaintiff had paid, laid out, and expended all moneys required in that behalf for labor and materials; and the answer admitted the perform-

ance, but denied the advance of any moneys by the plaintiff.

Defendant, by answer, furthermore claimed that the plaintiff had been fully reimbursed for all moneys advanced, and was saved harmless from all liability under his bond by the due and complete performance of the contract and acceptance of the work by the Church of St. Francis of Assisi. Three distinct and separate defenses—two of which were asserted also as offsets and counter-claims, and the other as a defense and offset only—were interposed to the complaint. One of these defenses and counter-claims charges the plaintiff with the conversion of money received under the building contract, but this is conceded to be sufficiently denied by the reply.

The other defense and counter-claim alleges the facts of the delivery of the contract, assignment, and power of attorney for the purpose stated in the complaint and admitted by the answer, and then further alleges that the power of attorney was revocable upon reimbursement to plaintiff for the money advanced by him, and that it was in fact revoked by service of a notice of revocation upon the Church of St. Francis of Assisi; but nowhere charges the plaintiff with the receipt of any money in excess of the sums advanced.

The third and remaining one of the defenses—that which was also pleaded as an offset only—alleges payment by plaintiff's receipt of money which accrued under the contract sufficient to reimburse him for any money advanced.

It is apparent from the mere statement of them that, while the two last above-mentioned defenses may have been properly pleaded as such as well as offsets, neither was available as a counter-claim.

In the absence of an order, therefore, that plaintiff be

Farrell v. Amberg.

required to reply to new matter pleaded in the answer, no reply was necessary. Section 514 of the Code of Civil Procedure requires a reply to a counter-claim only, and section 516 dispenses with a reply in every other case, unless one is directed to be served by order made on defendant's application. Accordingly, in the absence of such an order, no reply is necessary to mere matter of avoidance, or to matter constituting an offset, or recoupment, or alleged as payment (*Cockerill v. Loonam*, 36 *Hun*, 353; *Improvement Co. v. Staley*, 40 *N. Y. Super. Ct.* 539; *Burke v. Thorne*, 44 *Barb.* 363; *Scott v. Stockwell*, 65 *How. Pr.* 249; *Baylies' Code Pl. c. 13, p. 287*); and plaintiff did not, therefore, admit, as defendant's counsel contends, by failure to reply to the pretended counter-claim last above-mentioned, that the power of attorney was given solely to secure plaintiff against any liability upon his bond, assuming such to be the allegation of the answer upon a proper construction, or that the power of attorney was revocable and revoked.

Again, any allegation that the power of attorney was revocable and revoked by service of notice of revocation implies no more than the statement of legal conclusions, not of facts; and so, for that reason also, was not admitted, because not denied. The allegation of a legal conclusion is an immaterial averment. *Scofield v. Whitelegge*, 49 *N. Y.* 259; *People v. Commissioners of Highways*, 54 *N. Y.* 276. Only material matter, not controverted by answer or reply, shall be taken as admitted. *Code Civ. Pro.* § 522.

For the reasons hereinbefore stated, therefore, when the action proceeded to trial the following, also, were among the admitted facts: That the building contract, as well as the assignment thereof to Henry H. Amberg, and the power of attorney from the defendant to the plaintiff, were delivered to the plaintiff pursuant to an agreement that the plaintiff should be, by their means, secured against

Farrell v. Amberg.

all liability under his bond for the performance of the building contract, as well as for all moneys advanced by the plaintiff in the performance of the contract. The only testimony taken was that of the plaintiff, which was to the effect that the contract, assignment, and power of attorney were delivered to him simultaneously, that the work called for by the contract was done, and that he had paid all the money required for labor and materials in the performance of the work. Defendant offered in evidence a notice by him of revocation of the power of attorney, which was conceded to have been served upon the plaintiff and the Church of St. Francis of Assisi before the commencement of the action. No further evidence of any kind was adduced by either party, and the cause was thereupon submitted to the referee, who decided that the power of attorney was not revocable; that it was not revoked by defendant; and that plaintiff was entitled to recover the moneys paid into court.

The referee's findings of fact are consistent with all the admitted facts and plaintiff's testimony. No error is, therefore, predicable of the referee's refusals to find to the contrary. The power of attorney, also, was one coupled with an interest; hence the referee's conclusions that the power of attorney was not revocable, and was not revoked by the service of defendant's notice of revocation, in the absence of proof that the plaintiff was reimbursed for his outlays by his receipt of moneys which had accrued under the building contract or otherwise cannot be successfully controverted. "As the power of one man to act for another depends on the will and license of that other, the power ceases when the will or his permission is withdrawn. The general rule, therefore, is that a letter of attorney may at any time be revoked by the party who makes it and is revoked by his death. But this general rule, which results from the nature of the act

Farrell v. Amberg.

has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it." Chief Justice MARSHALL in *Hunt v. Rousmanier*, 8 *Wheat*, 174. See, also, *Knapp v. Alvord*, 10 *Paige*, 205; *Raymond v. Squire*, 11 *Johns*, 47; *DeForest v. Bates*, 1 *Edw. Ch.* 394; *Hutchings v. Hebbard*, 34 *N. Y.* 24.

A power of attorney to collect a fund, given to secure the payment of a debt due from the donor to the donee of the power operates as an equitable assignment of the fund. *Raymond v. Squire* and *De Forest v. Bates*, *supra*; *Wilson v. Troup*, 2 *Cow.* 195. An equitable assignment is none the less so because the interest it conveys is qualified and conditioned. *Holmes v. Evans*, 129 *N. Y.* 140.

We assume that the plaintiff's liability upon his bond, given to secure the due performance of the building contract with the Church of St. Francis of Assisi, had ceased, and that to that extent his interest in the moneys to be collected upon the contract had reverted to defendant; but it still remained to show, to extinguish the plaintiff's remaining interest in the moneys, that he had been reimbursed for all moneys paid, laid out, and expended by him. That fact was not admitted by the pleadings or on the trial. Its proof was incumbent upon defendant, who failed to supply it. The judgment should be affirmed with costs.

BOOKSTAVEN and PRYOR, JJ., concurred.

Dalton v. Vanderveer.

DALTON v. VANDERVEER.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY,
SPECIAL TERM, MAY, 1894.

§§ 1009, 3339.

Practice where upon trial of equitable action the cause of action at law is proved—right to trial by jury—distinction between law and equity.

Where the complaint is framed solely for equitable relief and the action is tried at special term, as an equitable action, and it is found upon the trial, that the plaintiff is not entitled to the relief demanded, the court cannot entertain the action to give damages, nor amend the complaint so as to change the action into one at law, but it should dismiss the complaint.

Where in an action founded upon the assertion that the plaintiff and the defendants were copartners in a business, brought to procure a judgment declaring the plaintiff the part owner of certain lands, for the appointment of a receiver to sell the same, and for an accounting and division of the profits, it appeared that the plaintiff and the defendant were not copartners, but that the plaintiff was an employee of the defendant to sell the land, and was to receive for his services a portion of the profits,—*Held*, that the court upon the trial of the action at special term, as an equitable one, could not grant the plaintiff judgment for damages, nor could it amend the complaint so as to change the action into one at law, but that the complaint must be dismissed.

The origin of the court of chancery and the distinction between law and equity stated.

The Code of Civil Procedure has not abolished the fundamental distinction between actions at law and suits in equity, but has merely changed and assimilated the forms of the two actions, and provided that they are to be administered by the same court, and under one system of practice.

Where an action is wholly equitable in character, and is tried as an equitable action, but the cause of action proved is one at law, the defendant has not waived his right to a jury trial by failing to demand it, nor has he waived it by failing to plead in his answer that the defendant has an adequate remedy by an action at law, nor can he be deprived of a jury trial by a determination of the action as though it were an action at law nor by amendment of the complaint.

(Decided May, 1894.)

Dalton v. Vanderveer.

Trial of action before the court without a jury.

The facts appear in the opinion.

GAYNOR, J.—The complaint alleges in sum and substance that the defendant owned a tract of sixty-five acres of land, and in order to secure the experience and assistance of the plaintiff in laying it out in lots and streets, and selling it off by lots at auction or private sale, entered into an agreement of copartnership with the plaintiff, whereby the plaintiff was given a certain interest in common with the defendant in the lands and the future proceeds of sales thereof; that out of such proceeds the defendant was first to be paid the moneys expended in preparing the land for sale by lots, as aforesaid, the agreement requiring him to advance it all; and then \$3000 an acre for the tract, after which the overplus, if any, should be divided between the parties, the plaintiff's share to be one-quarter; and that, after the plaintiff had so plotted and prepared the land for sale, and a large number of the lots had been actually sold, the defendant notified the plaintiff that he dissolved the partnership, and refused to go on any further with the enterprise as a joint one; and the prayer is for a judgment declaring the plaintiff to be a part owner of the land, for the appointment of a receiver to sell the land, and for an accounting and division.

The answer denies the copartnership, and alleges that the plaintiff was only the employee of the defendant.

The proof shows that there was no copartnership, but that the plaintiff was employed as an agent by the defendant to prepare the land for sale and sell it, as aforesaid and that for his services he was to be paid one-quarter of the overplus, as already stated; and that, after the contract had been partly performed, a large number of sales having been made, the defendant discharged the plaintiff. The

cause of action which the proof presents is, therefore, one for damages for breach of contract for services. The amount already realized from sales is easily ascertained. Past sales furnish evidence of the time and effort it would take to sell off all of the lots, and also of the price for which the lots can be sold, and it would not be difficult to otherwise prove their value ; so that no difficulty would be encountered in proving the damage which the plaintiff has sustained by the breach of the contract. In this state of the case, may the court go on and assess the damage in this action, or must the complaint be dismissed ? The complaint states a case which is within the jurisdiction of equity, and is not an action at law, but the evidence fails to sustain the complaint, and also fails to make out any case which is within the jurisdiction of equity. This being so, must not the complaint be dismissed ?

The origin of the High Court of Chancery in England was due wholly to the inability, and, to a limited extent, the unwillingness of the common law courts to entertain and give relief in every case, and thus meet all the requirements of justice. The common law courts paid such deference to forms and precedents that they became slaves to them. Their jurisdiction was thus circumscribed. They adhered to certain precise writs and rigid forms of action which were not sufficiently comprehensive to enable them to give adequate redress in some cases of injustice and wrong, or to give any redress in many others. In such cases the aggrieved person was remediless, except he could get a hearing of the king himself. Petitions by those in such case were, therefore, frequently presented to the king, asking for relief of him as matter of grace, because it could not be got of his courts. From the fact that the king usually referred such petitions to his secretary, called his chancellor, they came, in course of time, to be presented to the chancellor directly by the

Dalton v. Vanderveer.

suitors themselves; and thus, gradually, and at a time which history cannot enable us to precisely fix, the court of chancery came to be established. As is seen, its jurisdiction was wholly extraordinary. Relief was afforded by it only in those cases wherein the common law courts either could give no redress at all, or could not give adequate redress; and any one coming to chancery with a case which did not need its extraordinary jurisdiction, but could be adequately dealt with in the common law courts, was dismissed for lack of jurisdiction. Thus, side by side, there existed the court of chancery and the common law courts, each with a distinct jurisdiction, the test of chancery's jurisdiction in any given case being that the suitor could either get no relief, or could not get adequate relief, in a court of common law. And, therefore, necessarily, there also grew up, not only two distinct systems of practice in these courts, but also two distinct systems of substantive jurisprudence, that in the court of chancery being the system which we call equity. In the formation of the government of this State these two distinct kinds of courts and systems were given a place from the beginning, and the court of chancery here was clothed with the general jurisdiction and powers of the high court of chancery in England. Separate courts thus administered these separate systems of jurisprudence in this State until, by the Constitution of 1846, the court of chancery was abolished and its jurisdiction and powers were devolved upon the Supreme Court. From that time on the same court has administered justice under both systems; but, all the same, the two systems have necessarily preserved their identity and continued to exist. The court of chancery is gone, but the system of equity jurisprudence remains, and is still administered, but by the same court which also administers the common law system. There is only one court to administer both

Dalton v. Vanderveer.

systems, but they remain distinct systems. This much have I said because we seem sometimes to lose sight of it and think otherwise. The cause of this is, no doubt, the enactment in our first Civil Procedure Code of 1848, and found in our present revised Code of Civil Procedure, namely: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished" (section 3339). But this enactment relates only to the two systems of practice, and has no reference to the two systems of substantive jurisprudence. They still exist side by side, but the separate systems of practice under which they were formerly administered have been abolished, and the one system of our practice statute substituted. It is in this view that our Court of Appeals has said that "the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out" (*Gould v. Cayuga Bank*, 86 N. Y. 83); and again, that "the names of actions no longer exist, but we retain, in fact, the action at law and the suit in equity" (*Stevens v. The Mayor*, 84 N. Y. 304); and again, that "although the distinction between actions at law and suits in equity is abolished, the distinguishing features between the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is necessary to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors" (*Chipman v. Montgomery*, 63 N. Y. 230). In a word, the forms are all that are changed. The two distinct systems of justice still remain, though they are administered by the same court, under one system of practice.

This brings me down to saying what must be done with this action. Under our existing system, both actions at law and suits in equity being brought in the same court,

Dalton v. Vanderveer.

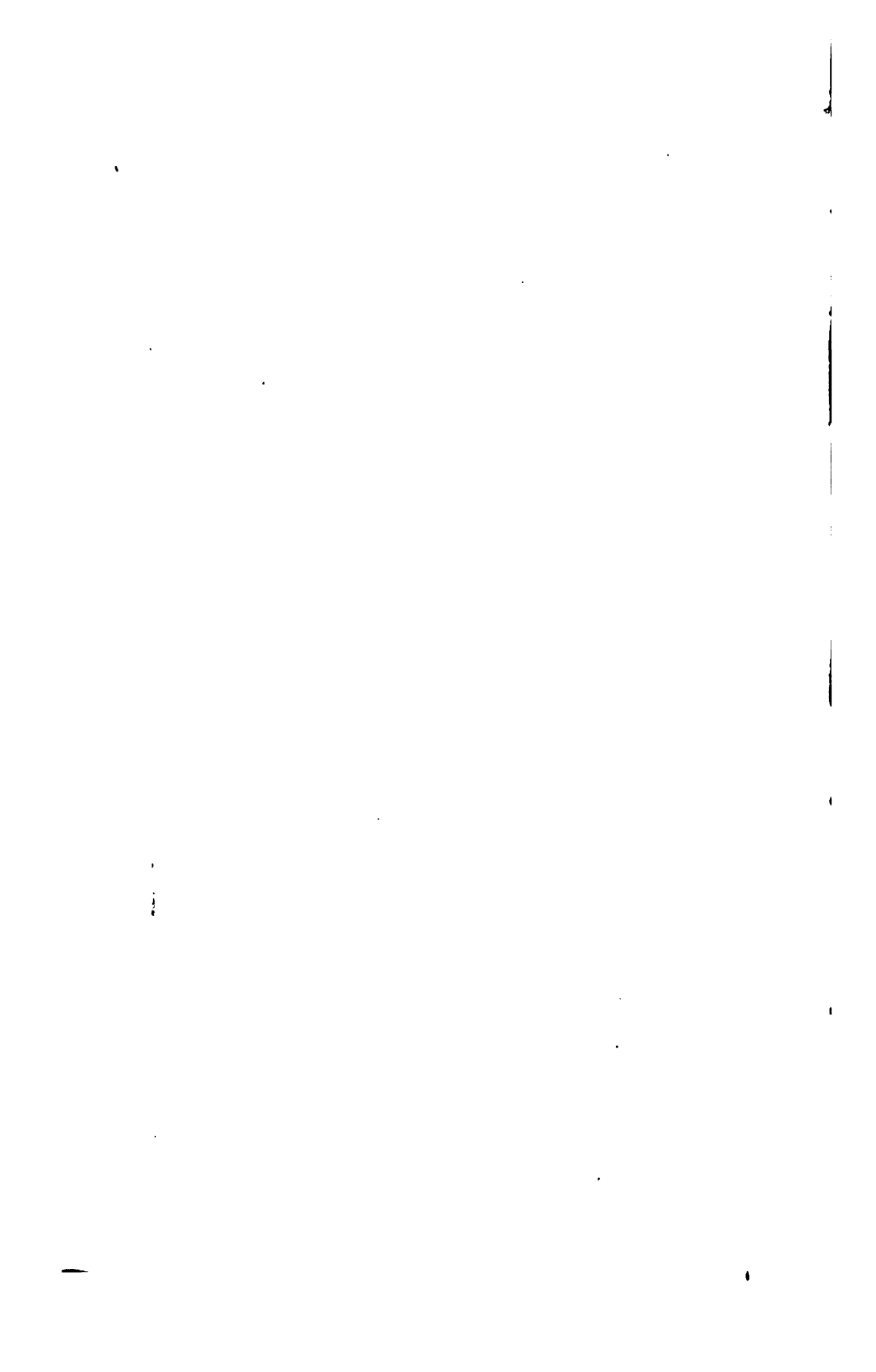
they are in regular course placed upon separate calendars by the parties themselves, namely, actions at law upon the calendar of causes to be tried by a jury, and equity actions upon the calendar of causes to be tried by the court without a jury. When chancery existed as a separate court, if a suitor came there with a common law action he was dismissed for lack of jurisdiction. But now if a plaintiff place an action at law upon the equity calendar, and notice it for trial there, he may not be dismissed out of court. The court may of its own motion, refuse to hear it and send it to the jury calendar; or, if the court be willing to hear it, the defendant may, nevertheless, by demanding a jury trial, have the cause sent to the jury calendar; and, if he do not so demand, he waives the right to a jury trial and confers jurisdiction upon the court to hear it without a jury; and the rule is the same whichever side has so placed it upon the calendar and noticed it (*Code Civ. Pro.*, § 1009). The cause of action stated in the complaint in this action being wholly equitable, and in no aspect constituting an action at law, the case was properly placed upon the equity calendar and noticed for trial there by the parties. For the same reason, the defendant had no right to demand a jury trial. The case presented by the complaint was not one which entitled the plaintiff to a jury trial, and he was bound by the complaint in that respect, it cannot, therefore, be claimed that he has waived a trial by jury of the cause of action presented by the evidence. Nor can it be said that, by failure to plead in his answer that the defendant had an adequate remedy by an action at law, he has waived his right to so claim now. When chancery existed as a separate court, and a suitor came there asking for equitable relief upon a statement of facts in his bill upon which he could get full, complete and adequate relief in an action at law, the chancellor was free to so inform him and refuse to be

Dalton v. Vanderveer.

vexed by his suit, but, in order that the defendant might so insist, and have the suit dismissed on his motion it was necessary for him to so plead in his answer, in default of which he was held to have waived that defense and submitted the cause to chancery for equitable disposition, provided that court could in the end make any such disposition of it; and such is still the rule of pleading (*Grandin v. LeRoy*, 2 *Paige*, 509; *Wiswall v. Hall*, 3 *Paige*, 313; *LeRoy v. Platt*, 4 *Paige*, 77; *Trascott v. King*, 6 *N. Y.* 147; *Town of Mentz v. Cook*, 108 *N. Y.* 504; *Ostrander v. Weber*, 114 *N. Y.* 95; *Watts v. Adler*, 130 *N. Y.* 646). But the facts stated in the complaint made the action at bar an equitable one solely, and not of legal cognizance, and, therefore, the defendant could not properly have pleaded that the plaintiff had an adequate remedy in an action at law. He was not required to plead that upon the actual facts which the plaintiff had not pleaded the plaintiff could get adequate redress in an action at law. He was only required to plead to the complaint; and the complaint being framed solely for equitable relief, it being found upon trial that the plaintiff is not entitled to such relief, the court cannot entertain the action to give judgment for damages or to amend the complaint so as to change the action into one at law (*Wheelock v. Lee*, 74 *N. Y.* 495; *Oakville Co. v. The Track Co.* 105 *N. Y.* 658; *Bockes v. Lansing*, 74 *N. Y.* 437).

The complaint is, therefore, dismissed, with costs.

END OF TEXT, VOL. XXIII.



INDEX.

	PAGE
Abatement and Revival —Where cause of action survives, action should be revived if necessary facts shown	153
— Delay of original plaintiff, or fact that action is not meritorious no ground for denying motion to revive	153
— Security for costs, when should not be required as condition of granting motion to revive	153
Affidavits —When court will strike out scandalous matter of its own motion	53
Answer —See PLEADING.	
Amendment —See JUDGMENT.	
Appeal —Security is necessary to perfect appeal from city court of New York to New York court of common pleas	140
— Practice where order striking out answer is reversed	56
— Stay pending, when prevents taking of proceedings to punish for contempt in not obeying directions of judgment appealed from	48
— Effect of failure to make or file case and practice in case of such failure	393
— What statement as to contents of case authorizes review of facts	171
— When such review had, although statement omitted	171
— Findings of fact, of court or referee, when reviewed.	171
— Exception to denial of motion to dismiss complaint and for direction of verdict in defendant's favor, on ground that claim is barred by statute of limitations, raises a question of law and case on appeal need not state that it contains all the evidence	225
— Does not lie from judgment by default	37, 56
— Substantial right within meaning of statutory provision for review of orders affecting substantial rights	37
— Order refusing to adjourn trial, when not reviewable	37
— Order of special term of court of common pleas dismissing appeal from city court of New York because it was not perfected, is not appealable	140
— Lies from order adjudging in contempt and fining defendants	115
— Merits when not considered on such an appeal	115
— On appeal from order of special term of supreme court, directing issuance of commission, general term should consider and pass on merits :	115
— Improper receipt in evidence of a deed immaterial error where recovery would be sustained if it would be stricken out	413

	PAGE
— What determinations of city court of New York reviewed by court of common pleas	37, 54
— When judgment of district court in the city of New York not reversed on appeal	21
— Court of common pleas will not on appeal from city court, review mere question of procedure not affecting substantial rights of merits	353
— When court of common pleas cannot review evidence on, from city court	321
— When may look into Records to ascertain whether there is insufficient proof	321
— Dismissal of action in justices' court on the ground that amount in dispute exceeded \$400 may be reviewed on appeal to county court for new trial	288
— Judgment will be reversed for error operating to prejudice or disadvantage of appealing parties	375
— Plaintiff on appeal from judgment dismissing complaint, cannot review interlocutory judgment overruling his demurrer to counter-claim contained in answer where the counter-claim was abandoned	375
— See COSTS; DISTRICT COURT IN THE CITY OF NEW YORK.	
Appearance—Defendant in action upon joint indebtedness may voluntarily appear, although not served	345
Arrest—Undertaking given to procure order of, does not secure costs of action	238
Assignment—See ATTORNEY'S LIEN.	
Association—When members of, may be sued on claim owing by, although president or treasurer has not been	21
Attachment—How levied upon property in possession of U. S. Government as subject to import duties	337
— What notice of levy sufficient	337
— When both the defendant and his assignee cannot move to vacate	251
— When recital in, of grounds, of disjunctively proper and sufficient	306
— Within what time indemnity bonds should be given or property delivered to claimant	397
— When vacated in action against foreign corporation because it does not appear where cause of action arose or that plaintiff is resident of State	348
Attorney's Lien—Is assignable	261
— Agreement by attorney to pay one not an attorney one-half the profits which may be realized in an action, "this to be a lien on said money," is valid <i>prima facie</i> as an assignment <i>pro tanto</i> of the attorney's fee and lien	261
— Who may maintain proceeding to enforce	204
— When enforced	204

	PAGE
Bill of Particulars—Affidavit of attorney in support of motion for, is not sufficient even where his client is a foreign corporation	44
— How far part of pleading	234
— When not to be included in judgment roll	234
Cause of Action—Distinction between law and equity	443
City Court of New York—See APPEAL.	
Code of Civil Procedure—Amendment of § 3256 by Laws of 1892, chap. 185, providing for taxation of stenographer's fees, was repealed by Laws of 1892, chap. 592	46
— Effect of amendment of § 1341 on § 3192, which made § 1341, as it was before the amendment, applicable to appeals to court of common pleas from city court of New York	140
Commission—Mode of setting interrogatories	317
— Interrogatories which may be, although they do not at present seem to be pertinent, should be allowed	98
— When oral cross-examination allowed	110
Complaint—See PLEADING.	
Consolidation of Actions—Discontinues original actions	87
— See COSTS.	
Contempt—Failure to obey order, directing return of deposit improperly withdrawn, may be punished as a	83
— Costs cannot be imposed in proceedings to punish criminal	115
— Proceedings to punish, are special proceedings, and an appeal lies from a final order made therein	115
— When and how party not served with injunction order may be punished for disobeying it	115
— To constitute civil, act must impair, defeat, impede, or prejudice right or remedy of party	115
— Advice of counsel, how far a defense	115
— When interposition of false answer is	379
— Punishment therefor	379
— Failure to obey mandates of judgment, not punishable as until after service of certified copy thereof	48
— When service on party's attorney insufficient	48
— When mandates of judgment, directing payment and delivery of money and property to receiver, are merely aids to money judgment, disobedience of them cannot be punished as contempt, while enforcement of money judgment is stayed pending appeal therefrom	48
— Disobedience of order or mandamus made or issued without jurisdiction is not	1
Contract—Where a person is made the sole arbiter of a contract, his decision is necessary before an action at law can be maintained	171
— What is not a waiver of architect's certificate as to completion of work on building	171
— When omissions and variations of ornamentation agreed to be made upon a house may justify an objection to paying for work done	171

	PAGE
Corporation —When resignation of officer of, not complete	29
— Demand for rent, when properly made of president of, who has tendered his resignation	29
— When court has not jurisdiction of action against foreign	348
— See JURISDICTION; RECEIVER; SUPPLEMENTARY PROCEEDINGS.	
Costs —Of motion at special term for new trial discretionary	216
— Determination as to award of, when final	216
— Who entitled to, when awarded "to defendant to abide the event"	216
— When demurrer sustained in part and overruled in part costs should not be awarded	183
— Liability of assignee of plaintiff's claim for	188
— Once paid as condition of obtaining a favor cannot be again taxed on final determination of action	97
— Trial fee may be taxed for dismissal of complaint subsequently set aside without terms, where defendant finally successful	113
— May be awarded by interlocutory judgment, sustaining demurrer to part of answer	146
— Cannot be imposed in proceedings to punish criminal contempt	115
— Where two actions are consolidated the successful party in the resulting action is entitled to costs only from the date of consolidation for proceedings subsequent thereto	87
— Recovery of, where new trial had on appeal from justice's court	256
— Right to, where demurrer sustained	284
— What, taxable upon an entry of interlocutory judgment sustaining demurrer with leave to plead over	295
— Awarded on appeal from order should be taxed by clerk	65
— Of appeal from order are, in absence of specific direction, \$10 and disbursements	65
— Of motion must be specifically named in order, and cannot be taxed by clerk unless power is expressly delegated to him	61
— <i>Extra Allowance</i> —Basis upon which computed in creditor's action to set aside conveyance	239
— In such action two defendants appearing by same attorney can have but one allowance	239
— Upon what granted in action to restrain operation of elevated railway and recover damages caused by it	180
— <i>Disbursements</i> —For extra advertising in action for partition not taxable	286
— Stipulation as to referee's fees when too indefinite	46
— Stenographer's fees on reference, not taxable in absence of stipulation that they may be	46
— On motion for alimony, disbursements for printing and referee's fees, but not for stenographer's fees, may be allowed	61
— On appeal from order, are not limited to disbursements for printing	65

	PAGE
Counter-claim—See PLEADING.	
County Court—Is of limited jurisdiction	210
— Plaintiff must show jurisdiction	210
— Has jurisdiction of action between non-residents to recover chattel within the county	210
Decedent's Real Estate—Sale of, to pay debts	128
Decision—Form of, overruling demurrer	208
Default—Opening of, is matter of discretion, and not reviewable on appeal	37
— When should be opened	137
— Service of copy of proposed answer on motion to open, in pleading	137
Definitions—"Account"	226
— "Evidence"	171
— "Forthwith"	397
— "Place for transaction of business in person."	171
— "Testimony."	171
— "Substantial right."	37
— "Sufficient cause"	71
Demurrer—SEE PLEADING.	
Disbursements—SEE COSTS.	
Discovery—SEE INSPECTION.	
District Court in the City of New York—Right of justice to demand evidence of attorney's authority	71
— Attorneys at law are recognized as officers of	71
— Action removed from to court of common pleas continues in effect an action in the District Court, subjects to all the inci- dents of such an action	363
— Allowance of amendment of pleading in, may be conditioned on payment of costs	363
— Amendment of pleadings in action removed from, to court of common pleas	90
— Jurisdiction of	90
— What counter-claims may be set up in action in	90
— Supplemental pleadings not authorized in action in, but same object may be attained by amendment of original pleading	363
— Justice of, cannot set aside verdict of jury	21
— Execution may issue on judgment of, docketed in county clerk's office, although action thereon is barred by the statute of limitations	297
— When judgment of, not reversed on appeal	21
Divorce—Decision of referee is not to be reviewed by court at special term, but merely will be examined to prevent a judg- ment where it would be plainly erroneous	386
— In such case error of law should be reviewed, not by the special term, but by the general term	386
Election—Court cannot be open on day of general, and mandamus cannot issue	1

	PAGE
— Voter denied right to vote at, has no remedy until after his right is lost	1
Equity—Distinction between common and law	443
— See SUMMARY PROCEEDINGS.	
Evidence—In proper receipt of is repaired by cumulative testimony to said fact	321
— Testimony to effect that property was delivered at the establishment of defendant's testator, is testimony to personal transaction with the defendant	321
Examination of party before trial—Affidavit by attorney when not sufficient	15
— Stating residences of parties in affidavit	15
— Where examination of more than one is sought, affidavit should show what it is expected each will prove, and only one should be examined if all are expected to testify to same facts . .	15
— Is not ordered as of course, but rests in sound discretion . . .	15
— Is matter of right, of testimony would be material and necessary on trial	67, 69, note
— Extent of justice's discretion	67, 69, note
— Previous examinations in supplementary proceedings no reason for denying	69, note
— When order for, sustained by complaint	195
Execution—Order direction return of deposit improperly withdrawn, cannot be enforced by	82
— Collection of costs awarded by interlocutory judgment . . .	146
— Pension money and property purchased therewith exempt . . .	161
— Exemption how protected where money invested in house upon which there are a mortgage and mechanic's liens	161
— Instance of a case where it was held that moneys collected on execution should not be paid over until a claim to a part thereof, founded upon an assignment of a part of the lien of the attorney for the plaintiff in the execution, was secured, or unless the amount of such claim was deducted and deposited in court to await the determination thereof	261
— When irregular because not conforming to judgment, but not void	241
— Void, furnishes no justification for acts done thereunder . . .	241
— If irregular, how far and when a justification for acts done under it	241
— May be issued on district court judgment, docketed in county clerk's office, action on which is barred by the statute of limitations	297
— See SUPPLEMENTARY PROCEEDINGS.	
Executor and Administrator—Decree granting letters of administration to minor absolutely void, and may be attacked collaterally	311, 429
— Contract made by minor while acting as administrator not binding on estate	429

	PAGE
— When claim against decedent's estate barred by short statute of limitations	422
— Rejection of one item of claim sufficient to set short statute of limitations running as to such item	422
— Rejection sufficient to set short statute running although notice to present claim not published	422
— Rejection may be by attorney	422
— Second rejection does not waive former rejection	422
— <i>Note on rejection of claim against decedent's estate</i>	427
Foreclosure —Corporate grantee of real property not necessary party to action to foreclose mortgage where deed not recorded and its manager is made defendant as owner of equity of redemption	197
— Order of reference to compute amount due, not jurisdictional	197
— When such order in due form	197
— Presumption as to referee's oath	197
— Judgment in action for, cannot be amended after sale by inserting provision for deficiency	264
Holiday —Court cannot be open on day of general election, except to receive a verdict or discharge a jury or for the exercise of certain jurisdiction in criminal cases	1
Infant —Cannot be administrator	311, 429
— Upon attaining majority may sue to disaffirm contract made by him while assuming during minority, to act as administrator	311, 429
Injunction —When may be granted restraining prosecution of summary proceedings	220
— See CONTEMPT.	
Inspection —When ordered of books and papers received by one defendant as assignee for the benefit of creditors of another defendant, in action to set aside preferences made by the assignor	80
Insolvent Debtor —Proceedings for discharge from imprisonment must conform to statute	331
— When schedule of property insufficient	331
Interpleader —Affidavit need not express doubt as to who has just claim	300
Joint Stock Company —See ASSOCIATION.	
Joint Tenancy —See PARTITION.	
Judgment —Entry of final, without further application to court in equitable action, where interlocutory judgment on demurrer directs, in case of failure, to pay costs and answer	143
— Interlocutory, sustaining demurrer to part of answer, may award costs, and provide for execution to collect	146
— On overruling demurrer	208
— Instance of, taken by default, which should be opened	137
— When not necessary to serve copy proposed answer on motion to open judgment taken by default	137

	PAGE
— Power of court to amend	95
— In action for foreclosure of mortgage cannot be amended after sale by inserting provision for deficiency	264
— When laches will defeat motion to set aside	10
— Liability merged in, cannot be revived by vacating	10
— When not set aside because of error of law	10
— Power of supreme court to vacate	10
Judgment Roll —What papers should be contained in when judgment is entered on demurrer	234
— Bill of particulars is not part of such a judgment roll	234
Jurisdiction —Must be expressly conferred	220
— When court has not jurisdiction against foreign corporation	348
— Of superior court of the city of New York, of action against foreign corporation	109
— See DISTRICT COURT IN CITY OF NEW YORK; JUSTICES COURT.	
Justices' Court —Jurisdiction depends not on amount claimed in pleadings, but on amount shown by proof to be in dispute	288
— Dismissal of action, on ground that amount in dispute exceeds \$400, may be reviewed on appeal for new trial	288
— Instance of case in which amount in dispute did not exceed \$400	288
— <i>It seems</i> , that there are no attorneys therein	71
— Judgment by default without personal service of summons can only be taken where the defendant's property has been attached	228
— Judgment by default should be reversed where attachment not duly levied and personal service of summons not made	228
— Defect in such case jurisdictional	288
— See DISTRICT COURT IN THE CITY OF NEW YORK.	
Lien —See ATTORNEY'S LIEN.	
Limitation to Action —Fact that action in judgment of District Court docketed in County Clerk's office is barred, does not prevent issuance of execution thereon	297
— Payment when does not extend time of	225
— Payment in settlement of an account is not an item in a mutual account within the meaning of the statute	225
— Mutual open and current account defined	225
— Time of bringing action to recover damages for personal injuries, caused by nuisance, is limited not to three but to six years	232
— When begin to run as to claim against decedent's estate	422
— What rejection of such claim sufficient to set statute running	422
Mandamus —When will issue to compel justice to make final order in summary proceedings	71
— Cannot be issued by judge at chambers	1
— The rule as to who may issue stated	1
— Cannot issue on election day	1
— Cannot be used as means of trying title to office	333

	PAGE
— Will not issue to compel recognition of court attendant when another has been appointed in relator's place, and is exercising duties of office	333
— <i>Note on distinction between causes where mandamus issue, and in which quo warranto is the remedy</i>	335
Mechanic's Lien —Action may be brought on bond given to discharge, without first prosecuting to the end an action to foreclose the lien	28
Merger —Right lost by, when cannot be revived	10
Mistake --A defect in a copy of a paper served is not cured by showing that the original is correct	319
— A party may always treat a copy of a paper served on him as a true copy of the original	319
Motion —When condition cannot be imposed upon denying	201
— On motion for leave to serve supplemental answer, the court may, under prayer "for such other and further relief" permit amendment of original answer	363
Negligence --Action for personal injuries caused by nuisance is not for	232
New Trial —When may be granted on minutes after dismissal of complaint	41
— Motion for, on ground of surprise	155
— When not granted, because of surprise consisting of absence of material witness	155
Notice of Trial —Is given and received subject to right to amend, demur or move on pleadings	146
— Does not prevent granting of motion for leave to serve supplemental answer	101
— When obvious clerical error not fatal	352
— <i>Note on effect of defects in</i>	353
Nuisance —Action to recover damages for personal injuries caused by, is not for negligence	232
Parties to Action —Nonjoinder of defendants, how taken advantage of	21
Partition --Property held in joint tenancy may be partitioned or sold though some of the joint tenants object	268
— The court has no power to direct extra advertising of sale in action for	287 note
— Disposition of infant's share	369
— Effect of death of owner of share after sale	369
Partnership —Existence of conditions precedent to contract not presumed	183
— When partner entitled to accounting	183
Place of Trial —Action against public officer for libel	201
— When condition cannot be imposed upon denying motion to change	201
— Which is proper county where only one of several parties reside within the State	403
— Right to change, to proper county absolutely	403

	PAGE
— When demand properly served after answer to original complaint, but before answer to amended complaint	403
Pleading —Rule as to construction of	434
— Allegation with power of attorney was revoked, his statement of a conclusion and not of a fact	434
— The conclusion in pleading need not be answered	434
— <i>Motion</i> to strike out sham may be made, notwithstanding giving and receipt of notice of trial	146
— <i>Amendment</i> of, in action removed from District Court to Court of Common Pleas	90
— Second amended complaint cannot be served of course after one has been stricken out as improperly served	400
— Amended complaint cannot be stricken out on the ground that it sets up a cause of action not stated in original complaint	400
— Cannot be amended on appeal if amendments substantially change claim or defense	341
— <i>Complaint</i> in action to determine conflicting claims to real property sufficient where it shows that plaintiff had constructive possession	326
— Complaint in action to determine claim to real property alleging the defendant unjustly claims fee insufficient unless other facts stated	326
— In action between partners for accounting, amount of profits plaintiff is entitled to and fact of his due performance of conditions subsequent need not be alleged	183
— Instance of complaint for money loaned held insufficient	183
— Failure to state domicile of foreign corporation not demurrable defect	390
— Recovery cannot be had upon cause of action differing from that pleaded	341
— Complaint stating cause of action on which defendants are separately but not jointly liable properly demurred to for misjoinder of causes of action	356
— <i>Demurrer</i> . Right to serve, to answer not affected by giving or receipt of notice of trial	146
— Fact that new matter stated as "further defense" is not stated as separate defense, does not prevent demurrer thereto	146
— Allegation in answer in action on note, that it was given to the payee for accommodation only is new matter, and may be demurred to	146
— Complaint may be demurred to for improperly uniting cause of action, although they are undistinguishably blended in a single count.	356
— <i>Answer</i> —Nonjoined of defendants, how set up	21
— When should not be stricken out as sham	56
— Denials of knowledge or information sufficient to form a believe when sufficient	56

	PAGE
— Instance of answer pleading breach of alleged condition precedent held insufficient	183
— In equity, an answer going to the relief demanded is proper	183
— Recital of facts forming basis of partial defense in complaint does not preclude their use as new matter in answer as basis of defense	183
— Denying transfer of note sued on, and alleging that payee is still the holder properly stricken out as sham, on payee's affidavit showing transfer to plaintiff	146
— Denial that plaintiff is holder of note sued on, without denying that he is the owner, raises no issue	146
— Denial of incorporation when insufficient	379
— <i>Counter-claim</i> —What may be interposed in action brought in district court, and removed to court of common pleas	91
— When may be set up by supplemental answer	101
— When in action of ejectment, counter claim for devise charged on land may be set up	157
— Action for accounting between partners is on contract and a counter-claim consisting of a cause of action on contract may be set up	183
— Instance of, for money loaned held insufficient	183
— Instance of case where fact while sufficient as defenses and offsets, were not available as counter-claims	434
— <i>Reply</i> not necessary which is insufficient to constitute a counter-claim	434
— Failure to reply when does not admit facts alleged	434
<i>Supplemental</i> —Adulteries committed subsequent to commencement of action for divorce may be pleaded by supplemental answer, both as defense and counter-claim	101
Power to permit service of supplemental answer, not taken away by services of notice of trial	101
Instance of case, in which there was an absence of such laches and bad faith as would defeat a motion for leave to serve supplemental answer	101
POOR PERSON —Right of infant to sue as	365
— Wealth of guardian <i>ad litem</i> does not prevent granting of permission to sue as	365
— Granting of leave to sue as not discretionary	365
PROCEEDINGS SUPPLEMENTARY TO EXECUTION —See SUPPLEMENTARY PROCEEDINGS.	
Prohibition —When writ of, not granting to restrain summary proceedings	417
Power of Attorney —When coupled with interest is irrevocable	434
Receiver —When, of foreign corporation may be appointed in supplementary proceedings	178, 246
— Temporary, of corporation may maintain any action or special proceedings to collect, receive or preserve its property	359

	PAGE
— May maintain proceeding for examination of person alleged to have corporate property in his possession	359
<i>Note on examination of person having property of corporation in his possession</i>	360
— In action by, filing of bond must be shown	41
Referee —When stipulation as to fees of, too indefinite	46
— When presumed to have taken oath	197
Replevin —What proof of value sufficient to sustain action	321
— When plaintiff may have judgment, although value not proven	321
Security for Costs —Infant plaintiff must give, although she has given, undertaking to procure an order of arrest	238
Service —What effort to serve summons, sufficient to authorize order for service by publication	197
— Order for service by publication need not contain option that service may be made out of the State	197
— What proof of publication sufficient	197
— Of summons by leaving on defendant's shoulder, when sufficient	59
— When not set aside as having been effected by trick	59
Statute —Rule as to interpretation of statute adopting prior statute, and effect of subsequent amendment of such prior statute	140
— "May" should be construed "must" where power is conferred for benefit of the public or a third person	365
Stenographer's Fees —Upon reference, not taxable in the absence of stipulation providing therefor	46
Summary Proceedings —Jurisdiction of justice in, with respect to equitable defenses	220
— Justice cannot require attorney to show his authority to appear	71
— Rules of supreme court apply to	71
— When tenant may invoke aid of court of equity, and enjoining summary proceedings	220
— When not restrained by writ of prohibition	417
— Provisions of code as to trial of question of title, do not apply to	417
— Question of title does not arise in only a question of possession	417
— Right of justice to try and power of justice to dismiss where questions of title appear on plaintiff's proof	417
— What is sufficient cause for refusing order awarding possession	71
— Justice cannot adjourn of his own motion	71
— Justice cannot delay making of order in, without sufficient cause.	71
— Design and intent of statute providing for	71
— When appeal from order in, does not act as stay	29

	PAGE
— Stay, pending appeal from judgment for rent, does not prevent demand of rent and maintenance of summary proceedings because of non-payment	29
— Demand for rent when pre-requisite to maintenance of	29
Summons—Copy served controls	319
— Court named in copy served, is court in which action is pending, although other papers are entitled in another court	319
— See SERVICE.	
Superior Court of the City of New York—When has jurisdiction of action against foreign corporation	106
Supplemental Pleading—See PLEADING.	
Supplementary Proceedings—Production of books; how enforced	253
— When maintainable against foreign corporation	10, 246
— When receiver of foreign corporation may be appointed	191, 246
— Office for transaction of business in person, defined	178
— Error in affidavit as to date of issuing execution may be disregarded	178
Surrogate's Court—When, may order sale of decedent's real property to pay debts, notwithstanding there is a power of sale in the executors	128
Trial—When adjournment of property refused	37
— Order refusing to adjourn, not reviewable on appeal	37
— Where motion to dismiss complaint is made on several grounds and denied, and then renewed on another ground, and granted without specifying on what ground, any of the grounds stated, if sufficient, will sustain	41
— Upon trial of demurrer, a claim by defendant that complaint is defective should receive first consideration	183
— Practice upon trial of equitable where cause of action at law is proved	443
— When complaint should be dismissed, because it is in equity and the cause of the action proved is at law	443
— What variance between pleading and proof is material	341, 375, 384
— What objection to evidence insufficient to sustain point that the evidence was not within the issues raised by the pleadings	413
— Non-suit is not a determination of the action upon the merits and does not bar any action	413
— Right to have issues framed for trial by jury when not waived by laches	408
— When trial by jury should be ordered of issues arising upon counter-claim in action to foreclose mechanic's lien	408
— Note on waiver of trial by jury	410
— When right of trial by jury is not waived by failing to demand it	443
— Distinction between law and equity	443
— Instance of case in which decision was against weight of evidence	422

	PAGE
— Request to charge properly where one proposition thereof is erroneous	321
— Question whether there is evidence for the jury is a question of law for the court to determine	321
— Improper receipt of evidence is cured by cumulative testimony to same fact , ...	321
— When judgment not reversed for error in admitting evidence	321
— When dismissal of complaint is	113
— See NOTICE OF TRIAL.	
Unincorporated Association—See ASSOCIATION.	
Undertaking—Liability of sureties in, to procure order of arrest	150
— See APPEAL, ARREST.	

Ex. p. 113.

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